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In the Supreme Court of the United States

OCTOBER TERM, 1980

UNITED STATES OF AMERICA, APPELLANT

v.

EDWIN D. LEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

Whether Sections 3101, 3111 and 3301 of the Internal Revenue Code of 1954, which impose social security taxes on employers and employees, is constitutional as applied to persons who object, on religious grounds, both to the payment of such taxes levied to support public insurance benefits and to the receipt of such benefits.

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OPINION BELOW

The findings of fact and conclusions of law of the district court (App. A, *infra*, 1a–8a) are not officially reported.

JURISDICTION

The judgment order of the district court was entered on July 15, 1980 (App. B, *infra*, 9a). A notice of appeal to this Court was filed on August 14, 1980 (App. C, *infra*, 10a). The jurisdiction of this Court rests on 28 U.S.C. 1252, which authorizes a direct appeal to this Court from a final judgment of a court of the United States holding an Act of Congress unconstitutional in a civil action to which the United States is a party. A direct appeal lies where, as here, a statute is held unconstitutional as applied to particular circumstances. *Fleming* v. *Rhodes*, 331 U.S. 100 (1947); see *United States* v. *Christian Echoes Ministry, Inc.*, 404 U.S. 561, 563 (1972); *United States* v. *American Friends Service Committee*, 419 U.S. 7 (1974).

STATUTES INVOLVED

Sections 1402(g), 3101, 3102, 3111 and 3301 of the Internal Revenue Code of 1954 (26 U.S.C.), are set forth in App. D, *infra*, 11a–15a.

STATEMENT

1. Appellee is a member of the Old Order Amish religious sect. That sect seeks to preserve a way of life emphasizing community welfare. A major tenet of the Old Order Amish faith is that each member must provide for the other members of the community who are in need of economic assistance. Because Old Order Amish members therefore care for their aged, their sick, and their unemployed, they do not need any form of social welfare benefits from outside their self-sufficient community. Moreover, the Old Order Amish believe that it is both a sin to accept social security benefits and to pay social security taxes. As a result, members of the sect are not

permitted by their religious beliefs to accept any benefits under the social security system, such as assistance for old age, death, disability or medical expenses (App. A, *infra*, 3a).

The social security system was established in 1935 by the Social Security Act, ch. 531, 49 Stat. 620, to provide a system of old age and unemployment benefits. The social security benefits are supported by various taxes, including a tax imposed by the Federal Insurance Contributions Act (FICA) on employees with respect to their wages (26 U.S.C. 3101), an excise tax imposed by that Act on employers with respect to wages paid their employees (26 U.S.C. 3111), and a second excise tax imposed by the Federal Unemployment Tax Act (FUTA) on employers with respect to wages paid to employees (26 U.S.C. 3301). In 1950, Congress extended the federal social security system to cover self-employed persons and, at the same time, enacted a tax on self-employment income to fund such coverage. See Social Security Act Amendments of 1950, ch. 809, Section 208(a), 64 Stat. 540, 26 U.S.C. (1952 ed.) 1401 and 1402.

In 1965, Congress added Section 1402(g) to the Internal Revenue Code, which allows an exemption from the self-employment tax to persons who, by reason of their adherence to the established tenets or teachings of (and membership in) a "recognized religious sect or division thereof," are "conscientiously opposed to acceptance of any private or public insurance" providing death, disability, old age, retirement or medical benefits.[1] This exemption is granted, however, only where the applicant waives all benefits under the Social Security Act (whether based on self-employment income or wages received as an employee) and where the Secretary of Health and Human Services has determined (1) that the particular sect has the requisite tenets or teachings; (2) that the sect has had,

[1] This statutory exemption originally designated as Section 1402(h) of the 1954 Code, was added by Section 321(a) of the Social Security Amendments of 1965, Pub. L. No. 89-97, 79 Stat. 286. Section 1402(h) of the Code was redesignated as Section 1402(g) by Section 1901(g)(155)(B) of the Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1520.

for a substantial period, the practice of making reasonable provision for its dependent members; and (3) that the sect has been in existence at all time since December 31, 1950.[2]

In enacting the exemption in Section 1402(g), the legislative history shows that Congress specifically intended to benefit the Old Order Amish sect. It found the exemption justifiable where individual members of such a sect "cannot accept the benefits of insurance, including social security benefits, without renouncing basic tenets of * * * [their] religion" and "sincerely believe that payment of social security taxes is irreconcilable with their religious convictions." H.R. Rep. No. 213, 89th Cong., 1st Sess. 101-102 (1965). The proposal was limited, however, to the self-employment tax imposed by Section 1401 because Congress understood that such individuals, by reason of their religious beliefs, "limit their work almost entirely to farming and to certain other self-employment" (*ibid.*). Thus, Congress provided no statutory exemption from the employer and employee FICA and FUTA taxes at issue in this case.

2. During 1970-1977, appellee employed several other members of the Old Order Amish sect who worked on his farm and in his carpentry shop. He did not, however, either withhold income taxes from their wages, or pay FUTA taxes or the employer's share of FICA taxes with respect to those wages. In 1978, the Internal Revenue Service assessed appellee for unpaid employment taxes for the years in issue in an amount exceeding $27,000. Appellee paid taxes in the amount of $91 attributable to wages paid to his employees for the first quarter of 1973. He thereafter instituted this proceeding in the United States District Court for the Western District of Pennsylvania for a refund of the amount paid and for injunctive relief

[2] Section 1402(e) of the Code also grants an exemption from the self-employment tax to ordained, commissioned or licensed ministers, certain members of religious orders and Christian Science practitioners who are opposed to the receipt of social security benefits on the grounds of conscience or religious principle. Prior to 1967, the exemption was automatic. It must now be affirmatively claimed, however, and applies only with respect to earnings derived from services performed as "such minister, member, or practitioner."

against the Commissioner of Internal Revenue with respect to the unpaid balance of the assessments. Appellee claimed that the imposition of FICA and FUTA taxes on the wages paid his fellow members of the Old Order Amish sect violated both his own rights and the rights of his employees under the Free Exercise Clause of the First Amendment of the Constitution (App. A, *infra*, 1a-2a).[3]

The district court upheld appellee's claim and concluded that "the tax is declared invalid and unconstitutional" (App. A, *infra*, 8a) on the ground that it infringed his First Amendment right to free exercise of religion. In support of its conclusion, the court relied upon the exemption provided by Section 1402(g) of the Code, even though that exemption relates only to the FICA tax on income from self-employment and not to the employer's share of FICA and FUTA taxes on employees' wages. As the court saw the matter, "[t]his distinction between a self-employment payment as 'income tax' and deduction and payment of an employee's tax as an 'excise tax' is a distinction without a difference and raising it does little credit to the government agencies concerned" (App. A, *infra*, 3a-4a). It accordingly ruled that appellee "and employers who fall within the carefully circumscribed definition provided in 1402(g), are relieved from paying the employer's share of FICA and FUTA as it is an unconstitutional infringement upon the free exercise of their religion" (App. A, *infra*, 8a).[4]

THE QUESTION IS SUBSTANTIAL

The judgment of the district court—holding unconstitutional the imposition of certain social security taxes upon

[3] The portion of the assessment representing income taxes required to be withheld from wages is not in issue in this case; it is to be abated because appellee's employees paid their own income taxes.

[4] The district court denied appellee's request for injunctive relief against the collection of the balance of the assessment because of the bar of the Anti-Injunction Act (26 U.S.C. 7421(a)) against such actions. It did so, however, "with the knowledge that the government has agreed not to collect such taxes during the pendency of this litigation and in the belief that the future collection activities will be circumscribed by the holding of this case" (App. A, *infra*, 8a).

appellee and his employees—has erroneously nullified an Act of Congress on grounds that have no basis in the decisions of this Court construing the Free Exercise Clause of the First Amendment. The question presented is significant because the district court concluded that the government's power to levy generally imposed taxes must yield to the religious beliefs of appellee and his employees, who oppose the payment of these taxes on religious grounds. But if the production of revenue is dependent on an accommodation between the permissible religious beliefs of each taxpayer and the social welfare policies of the government, our system of taxation would be seriously jeopardized. In these circumstances, the incidental burden on the exercise of appellee's and his employees' religion must give way to the vital governmental interest in maintaining the financial integrity and general support of the social security system, and to the larger governmental interest of maintaining authority to levy taxes for the general welfare.

1. The district court held that appellee, and similarly-situated employers who are members of a religious sect which is conscientiously opposed to acceptance of any private or public insurance, are relieved from the payment of the employer's share of FICA and FUTA taxes. But the conclusion of the district court cannot be squared with this Court's decisions construing the Free Exercise Clause of the First Amendment. To be sure, the Free Exercise Clause affords substantial protection for the diverse religious beliefs and practices in this country. Thus, this Court has held that the door of the Free Exercise Clause stands tightly closed against any governmental regulation of religious beliefs as such (*Cantwell* v. *Connecticut*, 310 U.S. 296, 303 (1940)), or with interference with the dissemination of religious ideas. See, *e.g.*, *Fowler* v. *Rhode Island*, 345 U.S. 67 (1953); *Follett* v. *McCormick*, 321 U.S. 573 (1944). It also prohibits misuse of secular government programs "to impede the observance of one or all religions or * * * to discriminate invidiously between religions, * * * even though the burden may be characterized as being only indirect." *Braunfeld* v. *Brown*, 366 U.S.

599, 607 (1961). "And even as to neutral prohibitory or regulatory laws having secular aims, the Free Exercise Clause may condemn certain applications clashing with imperatives of religion and conscience, when the burden on First Amendment values is not justifiable in terms of the Government's valid aims." *Gillette* v. *United States*, 401 U.S. 437, 462 (1971); see, *e.g.*, *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972).

It is equally well-established, however, that a person is not protected from every incidental burden on the exercise of his religion that may result from the implementation of a neutral, secular governmental interest. *Braunfeld* v. *Brown*, *supra*, 366 U.S. at 603; *Johnson* v. *Robison*, 415 U.S. 361, 383–386 (1974); *Gillette* v. *United States*, *supra*, 401 U.S. at 461–462; see *Prince* v. *Massachusetts*, 321 U.S. 158 (1944); *Reynolds* v. *United States*, 98 U.S. 145 (1878). In determining whether a particular statute is supported by a governmental interest that outweighs a person's free exercise rights, it is necessary—

> to balance the importance of the secular values advanced by the statute, the closeness of the fit between those ends and the means chosen, and the impact an exemption on religious grounds would have on the State's goals, on the one hand, against the sincerity and centrality of the objection to the State's goals to the sect's religious practice, and the extent to which the governmental regulation interfered with that practice, on the other hand.

McDaniel v. *Paty*, 435 U.S. 618, 635 n.8 (1978) (Brennan, J., concurring in the judgment). See *Wisconsin* v. *Yoder*, *supra*; *Johnson* v. *Robison*, *supra*. Accordingly, this Court has observed that a generally imposed income tax cannot rationally have a coercive effect on religious practices or beliefs. *Follett* v. *McCormick*, *supra*, 321 U.S. at 577–578; *Murdock* v. *Pennsylvania*, 319 U.S. 105, 112 (1943); see *Braunfeld* v. *Brown*, *supra*, 366 U.S. at 606. Indeed, one can hardly imagine a more neutral secular activity than the payment of generally imposed taxes.

Sherbert v. *Verner*, 374 U.S. 398 (1963) and *Wisconsin* v. *Yoder*, *supra*, upon which the district court relied (App.

A, *infra*, 5a-8a), are therefore distinguishable. In both of these cases, the infringement on the exercise of the individual's religion was far more burdensome, in the face of a less compelling government interest, than here. In *Sherbert*, a member of the Seventh-Day Adventist Church was discharged by her employer because she would not work on Saturday, the Sabbath Day of her faith. She was unable to obtain other employment in the vicinity where she lived because of her religious belief that she could not work on Saturday. South Carolina denied the appellant's claim for unemployment benefits on the ground that she failed without reasonable cause to accept available employment. This Court held that disqualification of a Seventh-Day Adventist from unemployment compensation solely because of her refusal to accept employment in which she would have to work on Saturday violated the Free Exercise Clause. The appellant in *Sherbert* was faced with an unacceptable choice. She had to give up either her Sabbath Day or her economic means of survival. Appellee faces no similar choice here.

Similarly, in *Yoder*, this Court upheld the claim of members of the Old Order Amish sect that enforcement of a state compulsory formal education requirement after the eighth grade would violate the free exercise of their religion. The interest of the state in requiring an additional one or two years of formal high school attendance was deemed insufficient against the claim that state formal education during the crucial adolescent years would expose them to dangerous worldly influences, and thereby threaten the religious survival of the Old Order Amish parents as well as their children. The choice faced by the Amish parents in *Yoder* likewise offered no basis for compromise. The parents there either had to risk losing their children from their faith or violate the law. No such choice need be made here. Although appellee claims that the payment of the tax would be a sin, it does not, as the burdens in *Sherbert* and *Yoder*, threaten the integrity of his religious beliefs. See also *McDaniel* v. *Paty*, *supra*; *Torcaso* v. *Watkins*, 367 U.S. 488 (1961).

2. The district court found that members of the Old Order Amish sect consider it to be a sin to accept social

security benefits and to pay social security taxes because "it is a sin to fail to provide for or to allow another to provide for your own people" (App. A, *infra*, 3a). But the payment of FICA and FUTA taxes does not prevent appellee from providing for his own people, nor are he or any of his employees forced to accept social security benefits. The Old Order Amish can protect the integrity of their own religious beliefs and practices simply by declining to accept social security benefits and continuing to provide support for those members of their community who are in need. The payment of FICA and FUTA taxes no more commits appellee or other members of the Old Order Amish sect to a binding insurance contract in violation of their religious beliefs than does the payment of federal income taxes, which are used to support a myriad of governmental benefits, many of which they or many other religious groups may oppose. See *United States* v. *American Friends Service Committee*, 419 U.S. 7 (1974).

Finally, apart from the impact that FICA and FUTA taxes may have on the exercise of appellee's religion, the governmental interest in maintaining widespread participation in the social security program is paramount. To a certain extent, social security benefits are dependent on the amount of taxes paid, but there is no perfect symmetry between contributions and benefits. See *Carmichael* v. *Southern Coal Co.*, 301 U.S. 495, 521–523 (1937). Appellee's FICA and FUTA taxes are commingled with other FICA and FUTA taxes and are used to support millions of other taxpayers who have no objection to receiving social security benefits and are, in fact, dependent upon such benefits. The government's ability to maintain a comprehensive social security program for the nation's unemployed and senior citizens would be severely strained if all those who could provide for themselves, either by individual or community efforts, could voluntarily withdraw from the program. The Free Exercise Clause has never been construed to interfere with such a fundamental societal activity as the payment of generally imposed federal taxes. As this Court observed in *Gillette* v. *United States*, *supra*, 401 U.S. at 461, in terms that effectively

refute the reasoning of the district court, "[o]ur cases do not at their farthest reach support the proposition that a stance of conscientious opposition relieves an objector from any colliding duty fixed by a democratic government." Surely the obligation to pay generally imposed FICA and FUTA taxes is such a duty. See *Johnson* v. *Robison*, *supra*.

3. Contrary to the reasoning of the district court, the Section 1402(g) religious exemption from the social security tax on self-employment income does not support appellee's claim to exemption from the employer's tax on wages. Since Section 1402(g) was enacted, there have been various constitutional challenges by taxpayers who sought either to have the statute set aside or to have the exemption extended to themselves, despite their failure to satisfy all of its conditions. But the courts have uniformly rejected these claims.[3] The courts that have reached the question have concluded that the exemption provided by Section 1402(g) is constitutionally permissible[4] and, until

[3] See, *e.g.*, *Kelley* v. *Terry*, No. 78-2750 (9th Cir. Aug. 27, 1980); *Ward* v. *Commissioner*, 608 F.2d 599 (5th Cir. 1979), cert. denied, No. 79-1313 (Apr. 28, 1980); *Jaggard* v. *Commissioner*, 582 F.2d 1189 (8th Cir. 1978), cert. denied, 440 U.S. 913 (1979); *Varga* v. *United States*, 467 F. Supp. 1113 (D. Md. 1979), aff'd by unpublished order No. 79-1371 (4th Cir. Feb. 27,1980); *Chapman* v. *Alexander*, 421 F. Supp. 930 (W.D. La. 1976)), aff'd by unpublished order No. 76-6086 (5th Cir. Apr. 28, 1977); *Escofil* v. *Commissioner*, 376 F. Supp. 521 (E.D. Pa.), aff'd per curiam, 493 F.2d 1400 (3d Cir. 1974); *Randolph* v. *Commissioner*, 74 T.C. 284 (1980); *Hatcher* v. *Commissioner*, 37 T.C.M. (CCH) 304 (Feb. 14, 1978), aff'd per curiam, 79-2 U.S.T.C. ¶ 9531 (10th Cir. July 27, 1979); *Lerner* v. *Commissioner*, 34 T.C.M. (CCH) 331 (Mar. 17, 1975), aff'd by unpublished order, No. 75-1770 (3d Cir. Jan. 13, 1976); *Henson* v. *Commissioner*, 66 T.C. 835 (1976); *Palmer* v. *Commissioner*, 52 T.C. 310 (1969).

[4] See, *e.g.*, *Jaggard* v. *Commissioner*, *supra*, 582 F.2d at 1190; *Varga* v. *United States*, *supra*, 467 F. Supp. at 1118-1119; *Lerner* v. *Commissioner*, *supra*, 34 T.C.M. (CCH) at 331 n.3. Other courts, however, have declined to reach the Establishment Clause issue raised in such cases on the theory that the taxpayer involved lacked standing to challenge the constitutionality of these provisions. See, *e.g.*, *Ward* v. *Commissioner*, *supra*, 608 F.2d at 601. Cf. *Varga* v. *United States*, *supra*, 467 F. Supp. at 1119 n.7.

the decision below, no court has ever suggested that it is constitutionally required under the Free Exercise Clause. Indeed, the courts have held that conscientious objection to the social security system and the taxes designed to support that system does not constitute a valid claim to exemption under the Free Exercise Clause, whether that opposition is based on philosophical or "moral" principles (*e.g.*, *Lerner* v. *Commissioner*, *supra*, 34 T.C.M. (CCH) at 331 n.3), or on sincerely held religious principles (*e.g.*, *Varga* v. *United States*, *supra*, 467 F. Supp. at 1117-1118; *Palmer* v. *Commissioner*, *supra*, 52 T.C. at 313; cf. *Escofil* v. *Commissioner*, *supra*.[5]

Thus, while Congress as a matter of legislative grace may have permissibly made this accommodation to the religious beliefs and social practices of members of the Old Order Amish sect, it was not compelled to do so by the

[5] Such decisions are fully in accord with a similar body of cases holding that conscientious opposition, on the basis of sincerely and fervently held religious beliefs, to the use to which the government makes of its revenues, or to contributing to such use, provides no basis under the Free Exercise Clause for avoiding the obligation to pay the full measure of income taxes imposed by Congress on all citizens. See, *e.g.*, *Lull* v. *Commissioner*, 602 F.2d 1166 (4th Cir. 1979), cert. denied, 444 U.S. 1014 (1980); *Autenrieth* v. *Cullen*, 418 F.2d 586 (9th Cir. 1969), cert. denied, 397 U.S. 1036 (1970); *Graves* v. *Commissioner*, 579 F.2d 392 (6th Cir. 1978); *Costello* v. *Commissioner*, 34 T.C.M. (CCH) 320 (Mar. 12, 1975), aff'd without opinion, 76-1 U.S.T.C., ¶ 9117 (2d Cir. Nov. 20, 1976); *Anthony* v. *Commissioner*, 35 T.C.M. (CCH) 1357 (Sept. 27, 1976), aff'd per curiam, 566 F.2d 1168 (3d Cir. 1977), cert. denied, 436 U.S. 904 (1978); *Runnings* v. *Commissioner*, 36 T.C.M. (CCH) 904 (July 13, 1977), *United States* v. *Haworth*, 386 F. Supp. 1099 (S.D. N.Y. 1974); *Muste* v. *Commissioner*, 35 T.C. 913 (1961); *Russell* v. *Commissioner*, 60 T.C. 942 (1973). As the Ninth Circuit observed in *Autenrieth* v. *Cullen*, *supra*, 418 F.2d at 588 (citations omitted), "[t]he Income Tax Act does not 'aid one religion, aid all religions, or prefer one religion over another.' Nor does it punish anyone 'for entertaining or professing religious beliefs or disbeliefs.' * * * It taxes plaintiffs like all others, because they are citizens or residents who have taxable income. On matters religious, it is neutral." These observations are equally applicable to the FICA and FUTA taxes at issue here. The FICA and FUTA taxes are also neutral, aiding no religion or preferring one religion over another.

Free Exercise Clause or any other provision of the Constitution. Once having granted this statutory exemption from the tax imposed by Section 1401 on income from self-employment, Congress was therefore under no compulsion to extend a similar exemption to employers and employees meeting the requirements of that section from the FICA and FUTA taxes imposed by Sections 3101, 3111 and 3301 of the Code.

The limitation in the Section 1402(g) exemption to the self-employment tax is in accord with the decisions of this Court holding that Congress has considerable discretion in the classification of taxpayers in implementing the social security system. *Carmichael* v. *Southern Coal Co., supra*; *Steward Machine Company* v. *Davis*, 301 U.S. 548 (1937). In *Carmichael* v. *Southern Coal Co., supra*, 301 U.S. at 509 (citations omitted), this Court established the permissible scope of classifications for federal tax purposes:

> This Court has repeatedly held that inequalities which result from a singling out of one particular class for taxation or exemption, infringe no constitutional limitation. * * *
>
> Like considerations govern exemption from the operation of a tax imposed on the members of a class. A legislature is not bound to tax every member of a class or none. It may make distinctions of degree having a rational basis, and when subjected to judicial scrutiny they must be presumed to rest on that basis if there is any conceivable state of facts which would support it.

See also, *United States* v. *Maryland Savings-Share Ins. Corp.*, 400 U.S. 4 (1970).

As we have noted, self-employed persons were generally not covered by the social security system at all until 1950 (Social Security Act Amendments of 1950, ch. 809, Section 208(a), 64 Stat. 540), and even now self-employed persons are taxed on a substantially different basis from employed individuals. Sections 1401 and 1402. In the light of the decisions in *Carmichael* v. *Southern Coal Co.*, *Helvering* v. *Davis* and *Steward Machine Co.* v. *Davis*, *supra*, it could hardly be contended that the distinction

drawn between self-employed persons and employees under either the original provisions of the Social Security Act or its present provisions is unconstitutional. The specific distinction drawn in Section 1402(g) between self-employed adherents of the Old Order Amish sect and members of that sect who employ or are employed by others is no more suspect, as a matter of either Due Process or First Amendment considerations, than the distinctions that have been drawn between self-employed persons generally.

The classification made in Section 1402(g) involves at most a difference in the tax treatment accorded employed and self-employed members of the same religious sect. Moreover, since appellee himself is treated in precisely the same manner, with respect to the FICA and FUTA taxes in question, as any other similarly situated employer, regardless of his religious beliefs, he can hardly complain that, as to himself, Section 1402(g) reflects an improper classification under either the Due Process Clause or the Free Exercise Clause.

At all events, we submit that Congress had a rational basis for limiting the Section 1402(g) exemption to the tax imposed on self-employment income under Section 1401 of the Code. The legislative history of Section 1402(g) shows that Congress was concerned that there would be no broad exception to the strongly held policy against making participation in the social security system a voluntary matter. Thus, the exemption was limited to the self-employment tax "since those persons for whom the payment of social security taxes appears to be irreconcilable with their religious convictions also, by reason of their religious beliefs, limit their work almost entirely to farming and to certain other self-employment." H.R. Rep. No. 213, 89th Cong., 1st Sess. 101–102 (1965). The Treasury supported this restriction because "these sects established in farming communities * * * could be more certainly relied upon to identify and provide for its dependent and elderly members than those in the mobile and transient urban environment." *Social Security: Hearings on H.R. 6675 Before the Senate Comm. on Finance*, 89th Cong., 1st Sess., *Pt. 2*,

1003 (1965). Moreover, the limitation of the Section 1402(g) exemption to self-employment taxes is a reasonable classification because it distinguishes between self-employed persons, who are most likely to possess the economic resources necessary to provide for themselves, and wage earners whose support may be dependent on someone else. It is reasonable to assume that even if it so desired, a religious group might not, in fact, be able to provide adequately for all its members who depend on employment, or in periods during which such individuals are otherwise unable to be gainfully employed. It was likewise reasonable for Congress to require that where such individuals depart from their traditional self-employment activities and engage in the economic community as employees or employers of others, they should be called upon to contribute to the social security system in the same measure as all other employers and employees, whether or not they ultimately choose to partake in the benefits of that system.

In sum, Section 1402(g) represents a reasonable compromise between the interest of the government in insuring maximum participation, in, and contribution to, the social security system, on the one hand, and the possibly conflicting beliefs of certain religious groups, on the other. *Committee For Public Education* v. *Nyquist*, 413 U.S. 756, 788 (1973). In attempting to implement purely neutral, secular goals through the social security system, Congress has tried to minimize, as a matter of legislative grace, otherwise justifiable burdens on members of religious groups like the Old Order Amish, without transgressing the restrictions of the Establishment Clause. *Social Security: Hearings on H.R. 6675 Before the Senate Comm. on Finance*, 89th Cong., 1st Sess, Pt. 2, 996–1000 (1965). The balance it has struck in this regard does not violate the First Amendment rights of appellee or the other members of the Old Order Amish sect whom he employs.

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted.

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NOVEMBER 1980

APPENDIX A

In the United States District Court
FOR THE WESTERN DISTRICT
OF PENNSYLVANIA

Civil Action No. 79-739

EDWIN D. LEE, PLAINTIFF

v.

UNITED STATES GOVERNMENT AND INTERNAL REVENUE SERVICE AND JEROME KURTZ, COMMISSIONER, INTERNAL REVENUE SERVICE, DEFENDANTS.

OPINION

This is an action for refund of $91.00 paid by plaintiff for withholding and FICA taxes on wages paid to his employees for the first quarter of 1973. The plaintiff, Edwin D. Lee, is a self-employed farmer and carpenter and a member of the Old Order Amish religion. During the years 1970 through 1977, Mr. Lee employed and paid wages to several Old Order Amish employees; however, he failed to file quarterly employment tax returns or annual unemployment tax returns, to withhold income tax or FICA tax from his employees' wages, or to pay the employer's portion of the employees' FICA or FUTA taxes. In 1978, the Internal Revenue Service assessed employment taxes in amounts exceeding $27,000. In 1979, plaintiff paid $91.00 of this amount, representing the assessment for the first quarter of 1977. His subsequent claim for refund was disallowed. The present suit was filed in July of 1979, seeking declaratory and injunctive relief from payment of the tax,

alleging the payment of the tax is a violation of his First Amendment right to the free exercise of his religion.

Once again, the Court is called upon to examine the beliefs of the Amish in the context of the First Amendment. The Old Order Amish occupy a respected and time-honored position in the history of this country. Their origins date back to the 16th century Swiss Anabaptists who separated themselves from institutionalized churches to preserve a non-competitive, closely-knit community life emphasizing "goodness" and community welfare. Throughout their history, the Amish have maintained this ideal. Despite continuing encroachment of the contemporary, worldly society, they have remained independent of society, yet interdependent among themselves. In a society witnessing the gradual erosion of such values, their efforts are worthy of preservation. Whether or not the preservation of their values falls within the present context—exemption from taxes based upon these admirable religious convictions—is the issue to be decided.

The Old Order Amish have been past recipients of both legislative and judicial grace. Section 1402(g) of the Internal Revenue Code exempts from payment of, *inter alia*, self-employment FICA taxes religious groups who provide their own form of old age and disability insurance to members of their sects.[1] In *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972), the Supreme Court exempted the group from compulsory public school attendance beyond the age of 13, stressing the importance of recognizing and preserving the Order as a "highly successful social unit within our soci-

[1] 26 U.S.C. 1402(g) Exemption.—Any individual may file an application (in such form and manner, and with such official, as may be prescribed by regulations under this chapter) for an exemption from the tax imposed by this chapter if he is a member of a recognized religious sect or division thereof and is an adherent of established tenets or teachings of such sect of division by reason of which he is conscientiously opposed to acceptance of the benefits of any private or public insurance which makes payments in the event of death, disability, old-age, or retirement or makes payments toward the cost of, or provides services for, medical care (including the benefits of any insurance system established by the Social Security Act).

ety" which "rejects public welfare in any of its usual modern forms." Plaintiff relies on the reasoning behind *Yoder* and 1402(g) for his argument to extend the exemption of 1402(g) and thereby relieve members of this sect from the requirement of withholding FICA taxes from Amish employees or from paying the employer's portion of FICA or FUTA taxes. His rationale is simple yet sincere: it is a sin to fail to provide for or to allow another to provide for your own people. "But if any provide not . . . for those of his own house, he hath denied the faith and is worse than an infidel." (I Timothy 5:8). Accordingly, they have a built-in, fool-proof social security system of their own—they care for their aged, their sick, their unemployed. They neither need nor would be permitted to accept any form of social security payments from outside their self-sufficient community. Not only is it considered a sin to *accept*, it is also considered a sin to *pay*, for to pay is to deny their faith. It is this crucial distinction which weakens an otherwise strong argument opposing Lee's claims.

The government concedes both the worthiness and the sincerity of the Amish beliefs, yet they counter with the inherent power of the government to tax. While recognizing the precedential weight of 1402(g) as a rationale for extending the exemption to include all forms of social security taxes, they argue the difference in the function of the tax. The 1402(g) exemption falls under the "income tax" provision of the Social Security tax system. The taxes at issue here—the employer's share of FICA, FUTA, and deduction of his employees' FICA taxes for which he is personally liable—are termed "excise taxes," a flat fee imposed upon an employer for the privilege of doing business, totally unrelated to the purpose served by the tax. These taxes are a contribution to a "general welfare" fund to provide for *all* who become dependent on society. As benefits under the SSA are not automatic, accruing only upon the filing of an application for receipt of benefits, plaintiff Lee need only refuse the benefits to avoid violating the precepts of his faith. This distinction between a self-employment payment as "income tax" and deduction

and payment of an employee's tax as an "excise tax" is a distinction without a difference and raising it does little credit to the government agencies concerned. Calling a rose a violet hardly changes its odor. The distinction overlooks the key contention: Payment of the tax is the sin that burdens the free exercise of the Amishman's religion.

The free exercise of one's religion is a fundamental, natural, absolute right, firmly entrenched in the foundation and the history of our legal system. Courts have given the First Amendment a broad interpretation in light of its history and the evils it was designed to prevent. When this right has come into conflict with an equally valued and respected governmental interest, the Court will apply a balancing test to determine which must yield to the other. A pattern has emerged from these conflicts which has set guidelines for determining the predominant interest. Courts have determined that while religious *beliefs* may be inviolate, religious *conduct* is not; therefore conduct jeopardizing public safety, peace, or order will fall to Governmental interest. *Reynolds* v. *United States*, 98 U.S. 145 (polygamy not protected by free exercise clause), *Prince* v. *Mass.*, 321 U.S. 158 (child labor law upheld against 9 year old child distributing religious pamphlets.) Failure to pay taxes is alleged to jeopardize the public welfare.

The government contends there is no constitutional right to be immune from taxes. The power to tax is a legitimate exercise of the government that overrides individual preference. The government draws an analogy to the challenges to the Selective Service laws as an interference with the free exercise of religion. The analogy is well taken: the power to conscript for war is also a legitimate government exercise. As in the present case, a legislative exemption was extended to those who, because of religious principles, opposed the concept of war. The cases cited by the government were attempts to expand the exemption to cover conscientious objectors who opposed particular wars (specifically, the Viet Nam war). *Gilette* v. *U.S.*, 401 U.S. 437 (1971), *Loewing* v. *U.S.*, 392 F.2d 219 (10th Cir. 1968). The expansion was denied because of the adminis-

trative burden of distinguishing valid claims from invalid ones and the political overtones inherent in such decisions. The present case presents no such problem. The group seeking exemption is clearly defined, long-recognized, and unquestionably sincere. Nor is there a danger of an open-ended category capable of uncontrolled expansion. The Old Order Amish, and groups like them, are small groups whose labor generates a small amount of wages and taxes. The loss of revenue from granting the exemption would be negligible. Clearly the granting of the exemption does not interfere with the establishment or preservation of the general welfare of the public. The history and intent of the 1402(g) exemption further underscores this conclusion:

> We believe that an exemption from Social Security taxes . . . would be justifiable only in cases where it is amply clear that an individual cannot accept the benefits of insurance, including social security benefits, without renouncing the basic tenet of his religion . . . (p. 101).
>
> . . . an exemption may be granted only if the Secretary of Health, Education & Welfare makes the following findings with respect to the religious sect: . . . That it is the practice and has been for a period of time which the Secretary deems to be substantial, for members of such sect or division thereof to make provisions for their dependent members which, in the judgment of the Secretary, is reasonable in view of the general level of living of the members of the Sect or division thereof. (p. 228).
>
> H.R. Rep. No. 213, 89th Cong. 1st Sess. (1965) pp. 101 & 228.

The Congress seems to have concluded that where a group is both religiously opposed to this form of public welfare *and* has provided its own alternative source of remedial welfare, the governmental interest has been protected and is therefore not required.

It was this same two-prong approach applied by the Supreme Court in *Yoder* v. *Wisconsin*, *supra*, that tipped the balance of interests in favor of the Yoders, an Amish family challenging the burden of a state compulsory school attendance law on the free exercise of their religion. The

combination of the burden on their religious exercise and the long standing tradition of providing alternative vocational training within their own community obviated the need for public education, and thus overrode the compelling state interest to provide for the general welfare via compulsory public school attendance to age 16.

The government points out a legislative caution in the 1402(g) exemption against any broadening of its coverage:

> The proposed exemption would be limited to the self employment tax under social security since those persons for whom the payment of social security taxes appears to be unreconcilable with their religious convictions also, by reason of their religious beliefs, limit their work almost entirely to farming and to certain other self-employment. H.R. Rep. No. 213, *supra*.

Again, the point is relevant, but it misses the mark. Mr. Lee has branched out from farming to employing others in his carpenter work. Is he to be penalized for not confining his work to self-employment? Clearly Congress has the power to both grant an exemption and to restrict its expansion, but the issue is the balancing of interests—which is to be paramount? When there is a burden on the free exercise of religion, only a "compelling" state interest will justify the state's constitutional power to regulate. *NAACP* v. *Button*, 371 U.S. 415 (1963), *Sherbert* v. *Verner*, 374 U.S. 398 (1963), *Yoder* v. *Wise*, *supra*.

As *Yoder* v. *Wisconsin* indicates, the *combination* of the burden on the free exercise of one's religion and the alternative method of achieving the same end will override the state's interest in regulating.

Sherbert v. *Verner* is on point—a South Carolina statute denied unemployment compensation benefits to a Seventh Day Adventist who, because of religious beliefs, could not work on Saturday and, therefore, could not find a job. The Court, upon weighing the competing interests, found the Seventh Day Adventists in the same dilemma as Mr. Lee—

> Here not only is it apparent that appellant's declared ineligibility for benefits derives solely from the practice of her religion, but the pressure upon her to forgo

> that practice is unmistakable. The ruling force her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship. 374 U.S. 398 at 404.

The Court rejected the Government's argument that the filing of fraudulent claims feigning religious objections to Saturday work would dilute the unemployment fund and disrupt the scheduling of work. The possibility of such abuse was of insufficient weight to counterbalance the burden on appellant's free exercise of religion.

> It is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, "[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation," Thomas v. Collins, 323 U.S. 516.

In dismissing the government's argument the Court stressed the need for the government to show *both* a burden on a compelling state interest and an alternative means to combat it. Both were absent in *Sherbert;* both are absent here. The exemption of 1402(g), with its complementary waiver of benefit forms, the tightly circumscribed definition of the group, and the reasoning for its exemption precludes the possibility of abuse by providing a readily available method of combatting it. Thus, even if it were arguable that the State's interest in taxing an employer to provide a general welfare fund for protection against life's misfortunes is a "compelling interest," both the burden on Mr. Lee's religious exercise and the alternative forms of compensating for the state's interest would combine to tip the scales in favor of Mr. Lee.

The Court in *Sherbert* distinguishes its decision from *Braunfeld* v. *Brown*, 366 U.S. 599 (1961); the comparison is relevant here. In *Braunfeld*, an Orthodox Jew challenged the state's Sunday closing law as an undue burden on the free exercise of his religion. Mr. Braunfeld's posi-

tion was not unlike that of Ms. Sherbert's and Mr. Lee's—he could forego his religious principles and do business six days a week or practice his religion and cut back his business to five days a week. The distinction, however, is crucial—Mr. Braunfeld's free exercise would cost him one day's sales; the loss of Sherbert and Lee (a job in Sherbert's case and any employment requiring the help of others by Mr. Lee) is a far greater hardship. The insignificant financial hardship suffered by Jewish merchants, coupled with the lack of any alternative means for the state to provide a uniform day of rest (the "compelling state interest"), and the economic disadvantage to merchants not exempted from Sunday closings was sufficient to override the burden on the religious exercise. In the present case, the burden on the free exercise is great, and there are alternative means both for achieving any "compelling" state interest and for combatting any abuses that may arise. Thus, plaintiff Lee, and employers who fall within the carefully circumscribed definition provided in 1402(g), are relieved from paying the employer's share of FICA and FUTA as it is an unconstitutional infringement upon the free exercise of their religion.

In view of the foregoing opinion the tax is declared invalid and unconstitutional. Plaintiff has also requested injunctive relief; however, 26 U.S.C. § 7421(a) of the Internal Revenue Code specifically indicates that injunctive relief is to be granted sparingly and only in exceptional circumstances. Therefore, this Court must deny plaintiff's request for injunctive relief with the knowledge that the government has agreed not to collect such taxes during the pendency of this litigation and in the belief that the future collection activities will be circumscribed by the holding of this case. If this belief should prove to be unfounded, further Court relief could be requested.

The foregoing shall constitute findings of fact and conclusions of law as required by Federal Rule of Civil Procedure 52(a). An appropriate order will issue.

APPENDIX B

ORDER

AND NOW, July 15, 1980, in accordance with the foregoing Opinion, IT IS ORDERED that plaintiff's Motion for Summary Judgment is hereby granted insofar as it requested refund of $91.00 and denied insofar as injunctive relief is requested.

IT IS FURTHER ORDERED that defendant's Motion for Summary Judgment is denied.

/s/ HUBERT I. TEITELBAUM
Hubert I. Teitelbaum
United States District Judge

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APPENDIX C

In the United States District Court for the WESTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 79-739

EDWIN D. LEE, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that the United States of America, the defendant above named, hereby appeals to the Supreme Court of the United States from the final judgment order entered in this action on July 15, 1980.

This appeal is taken pursuant to 28 U.S.C. Section 1252.

ROBERT J. CINDRICH
United States Attorney

By: /s/_____
Assistant United States Attorney
633 U.S.P.O. & Courthouse
7th Avenue & Grant Street
Pittsburgh, Pennsylvania 15219

Aug. 14, 1980

APPENDIX D

INTERNAL REVENUE CODE OF 1954 (26 U.S.C.):

Section 1402. DEFINITIONS.

* * * * *

(g) [as added by Section 319(c), Social Security Amendments of 1965, Pub. L. No. 89-97, 79 Stat. 391, as amended by Section 1901(a), Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat.] MEMBERS OF CERTAIN RELIGIOUS FAITHS.—

(1) *Exemption.*—Any individual may file an application (in such form and manner, and with such official, as may be prescribed by regulations under this chapter) for an exemption from the tax imposed by this chapter if he is a member of a recognized religious sect or division thereof and is an adherent of established tenets or teachings of such sect or division by reason of which he is conscientiously opposed to acceptance of the benefits of any private or public insurance which makes payments in the event of death, disability, old-age, or retirement or makes payments toward the cost of, or provides services for, medical care (including the benefits of any insurance system established by the Social Security Act). Such exemption may be granted only if the application contains or is accompanied by—

(A) such evidence of such individual's membership in, and adherence to the tenets or teachings of, the sect, or division thereof as the Secretary may require for purposes of determining such individual's compliance with the preceding sentence, and

(B) his waiver of all benefits and other payments under titles II and XVIII of the Social Security Act on the basis of his wages and self-employment income as well as all such benefits and other payments to him on the basis of the wages and self-employment income of any other person,

and only if the Secretary of Health, Education, and Welfare finds that—

(C) such sect or division thereof has the established tenets or teachings referred to in the preceding sentence,

(D) it is the practice, and has been for a period of time which he deems to be substantial, for members of such sect or division thereof to make provision for their dependent members which in his judgment is reasonable in view of their general level of living, and

(E) such sect or division thereof has been in existence at all times since December 31, 1950.

An exemption may not be granted to any individual if any benefit or other payment referred to in subparagraph (B) became payable (or, but for section 203 or 222(b) of the Social Security Act, would have become payable) at or before the time of the filing of such waiver.

* * * * *

(3) *Period For Which Exemption Effective* An exemption granted to any individual pursuant to this subsection shall apply with respect to all taxable years beginning after December 31, 1950, except that such exemption shall not apply for any taxable year—

(A) beginning (i) before the taxable year in which such individual first met the requirements of the first sentence of paragraph (1), or (ii) before the time as of which the Secretary of Health, Education, and Welfare finds that the sect or division thereof of which such individual is a member met the requirements of subparagraphs (C) and (D), or

(B) ending (i) after the time such individual ceases to meet the requirements of the first sentence of paragraph (1), or (ii) after the time as of which the Secretary of Health, Education, and Welfare finds that the sect or division thereof of which he is a

member ceases to meet the requirements of subparagraph (C) or (D).

* * * * *

SECTION 3101 [as amended by Section 321(b), Social Security Amendments of 1965, *supra*] RATE OF TAX.

(a) *Old-Age, Survivors, And Disability Insurance* In addition to other taxes, there is hereby imposed on the income of every individual a tax equal to the following percentages of the wages (as defined in section 3121(a)) received by him with respect to employment (as defined in section 3121(b))—

* * * * *

(b) [as added by Section 321(b), and amended by Sec. 111(G)(5), Social Security Amendments of 1965, *supra*] *Hospital Insurance.*—In addition to the tax imposed by the preceding subsection, there is hereby imposed on the income of every individual a tax equal to the following percentages of the wages (as defined in section 3121(a)) received by him with respect to employment (as defined in section 3121(b))—

* * * * *

SECTION 3102. DEDUCTION OF TAX FROM WAGES.

(a) [as amended by Section 205A, Social Security Amendments of 1954, ch. 1206, 68 Stat. 1052, Section 201(h)(3), Social Security Amendments of 1956, ch. 836, 70 Stat. 807, and Section 313(c)(2), Social Security Amendments of 1965, *supra*] *Requirement.*—The tax imposed by section 3101 shall be collected by the employer of the taxpayer, by deducting the amount of the tax from the wages as and when paid. An employer who in any calendar quarter pays to an employee cash remuneration to which paragraph (7)(B) or (C) or (10) of section 3121(a) is applicable may deduct an amount equivalent to such tax from

any such payment of remuneration, even though at the time of payment the total amount of such remuneration paid to the employee by the employer in the calendar quarter is less than $50; and an employer who in any calendar year pays to an employee cash remuneration to which paragraph (8)(B) of section 3121(a) is applicable may deduct an amount equivalent to such tax from any such payment of remuneration, even though at the time of payment the total amount of such remuneration paid to the employee by the employer in the calendar year is less than $150 and the employee has not performed agricultural labor for the employer on 20 days or more in the calendar year for cash remuneration computed on a time basis; and an employer who is furnished by an employee a written statement of tips (received in a calendar month) pursuant to section 6053(a) to which paragraph (12)(B) of section 3121(a) is applicable may deduct an amount equivalent to such tax with respect to such tips from any wages of the employee (exclusive of tips) under his control, even though at the time such statement is furnished the total amount of the tips included in statements furnished to the employer as having been received by the employee in such calendar month in the course of his employment by such employer is less than $20.

* * * * *

SECTION 3111 RATE OF TAX.

(a) [as amended by Section 321(c), Social Security Amendments of 1965, *supra*] *Old-Age, Survivors, And Disability Insurance.*—In addition to other taxes, there is hereby imposed on every employer an excise tax, with respect to having individuals in his employ, equal to the following percentages of the wages (as defined in section 3121(a)) paid by him with respect to employment (as defined in section 3121(b))—

* * * * *

(b) [as added by Section 321(c), and amended by Section 311(c), Social Security Amendments of 1965, *supra*] *Hospital Insurance.*—In addition to the tax imposed by the preceding subsection, there is hereby imposed on every employer an excise tax, with respect to having individuals in his employ, equal to the following percentages of the wages (as defined in section 3121(a)) paid by him with respect to employment (as defined in section 3121(b)) but without regard to the provisions of paragraph (9) thereof insofar as it relates to employees)—

* * * * *

SECTION 3301 [as amended by Section 301(a), Employment Security Amendments of 1970, Pub. L. No. 91-373, 84 Stat. 713] RATE OF TAX.

There is hereby imposed on every employer (as defined in section 3306(a)) for the calendar year 1970 and each calendar year thereafter an excise tax, with respect to having individuals in his employ, equal to 3.2 percent of the total wages (as defined in section 3306(b)) paid by him during the calendar year with respect to employment (as defined in section 3306(c)).

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CLERK

No. 80-767

In the Supreme Court of the United States

OCTOBER TERM, 1980

UNITED STATES OF AMERICA, APPELLANT

v.

EDWIN D. LEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

JOINT APPENDIX

Jurisdictional Statement Filed November 12, 1980
Probable jurisdiction noted March 23, 1981

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Answer to Amended Complaint (filed August 14, 1979)	16
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Relevant Docket Entries

Date	Nr.	Proceedings
1979		
May 29	1	Complaint filed
May 29		Summons issued
June 25	2	Summons returned served on Atty. Gen. 6/11/79; IRS 6/11/79
July 18	3	Amended complaint filed
Aug 7	4	summons ret served on US Atty on 7/20, by certifmail on deft 7/23 US Atty Gen 7/24
Aug. 14	5	ANSWER to AMENDED COMPLAINT filed by defts.
Aug 30	6	Pretrial order invoking rule 5–11, discovery complete 10/20; stip due 11/20 (Teitelbaum, J)
Nov 14	7	Pretrial stipulation filed
Dec 7	8	Amended pretrial stipulation filed
Dec. 31	9	Amended pretrial stipulation filed.
1980		
Jan 10	10	Order that briefs be filed re mot for summary jdmt (Teitelbaum, J)
Feb 4	11	Notice setting conference for 2/13 at 1:45 (Teitelbaum, J)
Mar 3	12	Pretrial stipulation filed
Mar 4	13	Order entered directing that the moving parties file within 30 days from the date of the order a brief in support of motions for summary judgment and that respondent file a brief in support of its positions within 20 days. (Teitelbaum J)
Apr 3	14	Mot for summary judmt filed by deft US
Apr 3	15	Mot for summary judmt filed by plf
Apr 3	16	Notice service mot for summ judt on deft filed by plf
May 12	17	Notice setting arg for 5/19 at 10 AM

ate	Nr.	Proceedings
May 19	18	Hearing, Teitelbaum, J-Memo filed (rep Lilienthal) CAV
Jul 15	19	Opinion and order that plf mot for summary jdmt is granted insofar as it requested refund of $91.00 and denied insofar as injunctive relief is requested. Further, deft mot for summary jdmt is denied (Teitelbaum, J)
Jul 15		Pursuant to opinion and order ent, jdmt ent accordingly of record against deft US G Conley, Clerk
Jul 15		Notice issued
Aug 14	20	NOTICE OF APPEAL TO SUPREME COURT by US Atty from order 7/15
Aug 14		Copy notice to Supreme court and counsel with docket entries
Oct 9	—	Copy letter from Supreme Court dtd 10/6/80, to W H McCree, Solicitor Gen of dept justice, ext time to docket appeal to 11/12/80
1981		
Mar 27	—	Certif copy order from Supreme Court noting probable jurisdiction

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 79-739

COMPLAINT

[filed May 29, 1979]

EDWIN D. LEE, PLAINTIFF,

v.

UNITED STATES GOVERNMENT AND INTERNAL REVENUE SERVICE AND JEROME KURTZ, COMMISSIONER, INTERNAL REVENUE SERVICE, DEFENDANTS

PRELIMINARY STATEMENT

1. This is an action seeking relief as authorized by Title 28 U.S.C. §§ 2201 and 2202, 28 U.S.C. § 1340 and the First and Fourteenth Amendments of the United States Constitution. Plaintiff seeks a preliminary and permanent injunction against the collection of taxes, declaratory judgment and costs including reasonable attorney's fees.

JURISDICTION

2. Jurisdiction is founded upon Title 28 U.S.C. § 1340 and under the general equity jurisdiction of the Federal District Court because the illegality of the tax sought to be enjoined, and the circumstances, as herein more fully appears, constitute such special, extraordinary, and exceptional circumstances as to constitute an exception to the Internal Revenue Code of 1954 § 7421(a), 26 U.S.C. § 7421(a).

3. Jurisdiction is also founded upon Title 28 U.S.C. §§ 2201 and 2202, granting any Court of the United States, in a case of actual controversy within its jurisdiction, the power to declare the rights and other legal relations of any interested party seeking such declaration and to grant fur-

ther necessary and proper relief based upon a declaratory judgment or decree.

4. Jurisdiction is also founded upon Title 28 U.S.C. § 1331(a) granting the District Courts original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of Ten Thousand ($10,000.00) Dollars exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

5. This is a civil action for injunctive and declaratory relief arising under the First Amendment to the Constitution of the United States as more fully hereinafter set forth. The matter in controversy involves, exclusive of interest and costs, a sum in excess of Ten Thousand ($10,000.00) Dollars and this Court has jurisdiction by reason of Title 28 U.S.C. § 1331(a).

6. This is a civil action for injunctive and declaratory relief arising under Section One of the Fourteenth Amendment to the Constitution of the United States as more fully hereinafter set forth. The matter in controversy involves, exclusive of interest and costs, a sum in excess of Ten Thousand ($10,000.000) Dollars, and this Court has jurisdiction by reason of Title 28 U.S.C. § 1331(a).

PARTIES

A. *Plaintiff*

7. Plaintiff, Edwin D. Lee, is a citizen of the United States and a resident of the State of Pennsylvania, residing at R.D. #1, New Wilmington, Pennsylvania.

8. Plaintiff, Edwin D. Lee, was, at the time this cause of action arose, and is now a member of a bona fide religious order known as the Old Order Amish.

9. Plaintiff, Edwin D. Lee, was, at the time this cause of action arose, and is now a member of the Old Order Amish and a self-employed farmer who is not subject in that capacity for the payment of social security taxes.

10. Plaintiff, Edwin D. Lee, was, at the time this cause of action arose, and is now an employer of other members of the Old Order Amish.

B. *Defendants*

11. United States Government whose principal residence is Washington, D.C., in care of the Attorney General of the United States.

12. Internal Revenue Service whose principal residence is Washington, D.C.

13. Jerome Kurtz, current Commissioner of the Internal Revenue Service, whose principal address is Washington, D.C.

COMPLAINT

14. The plaintiff is a member of the Old Order Amish, who is self-employed. A portion of the taxes which the United States of America seeks to collect represents social security taxes which the plaintiff failed to withhold from the pay of other members of the Old Order Amish, whom he employed.

15. The Internal Revenue Code provides an exemption from self-employment tax if a person can show he is self-employed and is a member of a religious sect which follows the practice of making provisions for its dependent members. The exemption does not extend to cover those who work for others.

16. The illegality of the tax sought to be enjoined, and the circumstances, as herein more fully appears, constitute such special, extraordinary, and exceptional circumstances as to constitute an exception to the Internal Revenue Code of 1954 § 7421(a), 26 U.S.C. § 7421(a).

17. This is an action to enjoin the defendant from beginning or continuing in force and effect both a purported assessment and levies against the property of plaintiff allegedly to be applied to federal social security taxes due or to become due in respect of any period falling within the period set forth in the notices forwarded to the Plaintiff.

18. On or about October 16, 1978, the plaintiff received from the defendant notice dated October 13, 1978, setting forth therein monies due the plaintiff [sic][1], a portion of

[1] Although the complaint used the term plaintiff here, it is obvious that the term defendant was intended.

which include social security taxes which the plaintiff did not withhold from the wages of individuals who worked for him and who were members of the Old Order Amish.

19. Notwithstanding the fact that under the present law the self-employment tax exemption does not extend to cover those who work for others, the plaintiff did not withhold social security taxes from the employees who worked for him who are members of the Old Order Amish.

20. If social security taxes were withheld from employees who are members of the Old Order Amish, it would deny to them the same rights afforded to members of the Old Order Amish, who are self-employed, as guaranteed by the due process and equal protection clauses of the Fourteenth Amendment of the United States Constitution.

21. Further, enforcement of the federal statute herein complained of is in derogation of plaintiff's First Amendment rights regarding the establishment and free exercise of his religion.

22. The plaintiff is denied access to the administrative procedure within the Internal Revenue Service in that the plaintiff has been notified that since the objections are based on religious beliefs, the Appellate Division of the Internal Revenue Service does not have jurisdiction.

23. The statutory exception for Tax Court proceedings is not applicable to a suit to enjoin the collection of past-due social security taxes, since the Tax Court is without jurisdiction over such taxes. *Enochs v Williams Packing and Navigation Co.* 370 US 1.

24. Nor can plaintiff litigate the merits of defendants' determination of tax by refund suit in the United States District Court or in the United States Court of Claims by reason of the requirement of *Flora v United States.* 362 US 145 (1960), decision on rehearing, 357 US 63 (1958), to the effect that a taxpayer must pay the full amount of what income tax the government says he owes for any period before the taxpayer may sue for the refund of any part thereof, and plaintiff is wholly unable to comply with such requirement as his only asset is real estate, which would have to be sold in order for the taxes to be paid. Under 28 U.S.C. § 1346(a)(1), District Courts shall have jurisdiction

concurrent with the Court of Claims. However, concurrent jurisdiction does not exist because the plaintiff's objections are based on religious beliefs and consequently, the Appellate Division of the Internal Revenue Service does not have jurisdiction.

25. The plaintiff alleges that the tax sought to be enjoined is illegally levied since it is a denial of the Equal Protection of the Laws Clause of the Fourteenth Amendment to the Constitution of the United States in that the tax is not levied upon self-employed members of the Old Order Amish but is only levied upon those members of the Old Order Amish who work for others.

26. Equity jurisdiction should intervene in that special extraordinary circumstances exist since the plaintiff has been denied access to the Appellate Division of the Internal Revenue Service, and the Tax Court, and he is unable to completely comply with the requirement of *Flora v United States*, 357 US 63 (1956), because of the reason alleged herein; and equity jurisdiction should intervene since the tax levied is illegal in that it clearly is in violation of the Equal Protection Clause of the United States Constitution.

27. This suit for preventative injunctive relief should be granted and the Anti-Injunction Act of the Internal Revenue Code 26 USCS 7421(a) should not be applied since the government cannot ultimately prevail in this matter and equity jurisdiction should otherwise exist because of the reasons set forth elsewhere herein.

28. Defendants now threaten to immediately levy on and sell plaintiff's property to satisfy the illegal and void assessment.

29. Plaintiff has no adequate remedy at law, as herein above set forth, and there is no way of testing plaintiff's liability short of violation.

30. Plaintiff will suffer irreparable injury unless Defendant is enjoined, both permanently and during the pendency of this action, and, pending the hearing on the preliminary injunction, is temporarily restrained, from collection of this tax because enforcement of the tax against Plaintiff would impose a tax that Plaintiff is unable to pay and would sub-

ject Plaintiff to heavy penalties and the possible forfeiture of all of his possessions and property.

31. The injunctive relief herein prayed is not precluded by 26 U.S.C. § 7421(a), because the assessment is illegal and void, and enforcement of the tax against Plaintiff would lead to the imminent destruction of Plaintiff's business, would ruin Plaintiff financially, and would inflict losses for which Plaintiff has no adequate remedy at law.

WHEREFORE, Plaintiff prays for judgment as follows:

32. That the above complained of federal tax statute be adjudged illegal and invalid as applied to and assessed against Plaintiff Lee.

33. That Defendants be enjoined, both permanently and during the pendency of this action, and, pending the hearing on the preliminary injunction, temporarily restrained from collection or attempting to collect from Plaintiff any federal social security tax purported to be assessed under the above referenced federal tax statute.

34. Grant Plaintiff the costs of this action, including interest on the total sum awarded at a rate of six (6%) percent, reasonable attorney's fees, to be paid by Defendants.

35. Grant an order for such other and further relief as the Court may deem necessary and proper and to declare the rights and other legal relations of any interested party seeking such declaration.

Respectfully submitted,

CAIAZZA & LAMANCUSA

By_____

FRANCIS X. CAIAZZA, ESQ.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 79–739

AMENDED COMPLAINT

[filed July 18, 1979],

EDWIN D. LEE, PLAINTIFF,

v

UNITED STATES GOVERNMENT AND INTERNAL REVENUE SERVICE AND JEROME KURTZ, COMMISSIONER, INTERNAL REVENUE SERVICE, DEFENDANTS

PRELIMINARY STATEMENT

1. This is an action seeking relief as authorized by Title 28 U.S.C. §§ 2201 and 2202, 28 U.S.C. § 1340 and the First and Fourteenth Amendments of the United States Constitution. Plaintiff seeks a preliminary and permanent injunction against the collection of taxes, declaratory judgment and costs including reasonable attorney's fees.

JURISDICTION

2. Jurisdiction is founded upon Title 28 U.S.C. § 1340 and under the general equity jurisdiction of the Federal District Court because the illegality of the tax sought to be enjoined, and the circumstances, as herein more fully appears, constitute such special, extraordinary, and exceptional circumstances as to constitute an exception to the Internal Revenue Code of 1954 § 7421(a), 26 U.S.C. § 7421(a).

3. Jurisdiction is also founded upon Title 28 U.S.C. §§ 2201 and 2202, granting any Court of the United States, in a case of actual controversy within its jurisdiction, the power to declare the rights and other legal relations of any interested party seeking such declaration and to grant fur-

ther necessary and proper relief based upon a declaratory judgment or decree.

4. Jurisdiction is also founded upon Title 28 U.S.C. § 1331(a) granting the District Courts original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of Ten Thousand ($10,000.00) Dollars exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

5. This is a civil action for injunctive and declaratory relief arising under the First Amendment to the Constitution of the United States as more fully hereinafter set forth. The matter in controversy involves, exclusive of interest and costs, a sum in excess of Ten Thousand ($10,000.00) Dollars and this Court has jurisdiction by reason of Title 28 U.S.C. § 1331(a).

6. This is a civil action for injunctive and declaratory relief arising under Section One of the Fourteenth Amendment to the Constitution of the United States as more fully hereinafter set forth. The matter in controversy involves, exclusive of interest and costs, a sum in excess of Ten Thousand ($10,000.00) Dollars, and this Court has jurisdiction by reason of Title 28 U.S.C. § 1331(a).

PARTIES

A. *Plaintiff*

7. Plaintiff, Edwin D. Lee, is a citizen of the United States and a resident of the State of Pennsylvania, residing at R.D. #1, New Wilmington, Pennsylvania.

8. Plaintiff, Edwin D. Lee, was, at the time this cause of action arose, and is now a member of a bona fide religious order known as the Old Order Amish.

9. Plaintiff, Edwin D. Lee, was, at the time this cause of action arose, and is now a member of the Old Order Amish and a self-employed farmer who is not subject in that capacity for the payment of social security taxes.

10. Plaintiff, Edwin D. Lee, was, at the time this cause of action arose, and is now an employer of other members of the Old Order Amish.

B. *Defendants*

11. United States Government whose principal residence is Washington, D.C. in care of the Attorney General of the United States.

12. Internal Revenue Service whose principal residence is Washington, D.C.

13. Jerome Kurtz, current Commissioner of the Internal Revenue Service whose principal address is Washington, D.C.

COMPLAINT

COUNT ONE

14. The Plaintiff is a member of the Old Order Amish, who is self-employed. A portion of the taxes which the United States of America seeks to collect represents social security taxes which the plaintiff failed to withhold from the pay of other members of the Old Order Amish, whom he employed.

15. The Internal Revenue Code provides an exemption from self-employment tax if a person can show he is self-employed and is a member of a religious sect which follows the practice of making provisions for its dependent members. The exemption does not extend to cover those who work for others.

16. The illegality of the tax sought to be enjoined, and the circumstances, as herein more fully appears, constitute such special, extraordinary, and exceptional circumstances as to constitute an exception to the Internal Revenue Code of 1954 § 7421(a), 26 U.S.C. § 7421(a).

17. This is an action to enjoin the defendant from beginning or continuing in force and effect both a purported assessment and levies against the property of plaintiff allegedly to be applied to federal social security taxes due or to become due in respect of any period falling within the period set forth in the notices forwarded to the Plaintiff.

18. On or about October 16, 1978, the plaintiff received from the defendant notice dated October 13, 1978, setting

forth therein monies due the plaintiff [sic][2], a portion of which include social security taxes which the plaintiff did not withhold from the wages of individuals who worked for him and who were members of the Old Order Amish.

19. Notwithstanding the fact that under the present law the self-employment tax exemption does not extend to cover those who work for others, the plaintiff did not withhold social security taxes from the employees who worked for him who are members of the Old Order Amish.

20. If social security taxes were withheld from employees who are members of the Old Order Amish, it would deny to them the same rights afforded to members of the Old Order Amish, who are self-employed, as guaranteed by the due process and equal protection clauses of the Fourteenth Amendment of the United States Constitution.

21. Further, enforcement of the federal statute herein complained of is in derogation of plaintiff's First Amendment rights regarding the establishment and free exercise of his religion.

22. The plaintiff is denied access to the administrative procedure within the Internal Revenue Service in that the plaintiff has been notified that since the objections are based on religious beliefs, the Appellate Division of the Internal Revenue Service does not have jurisdiction.

23. The statutory exception for Tax Court proceedings is not applicable to a suit to enjoin the collection of past-due social security taxes, since the Tax Court is without jurisdiction over such taxes. *Enochs v Williams Packing and Navigation Co.* 370 US 1.

24. Nor can plaintiff litigate the merits of defendants' determination of tax by refund suit in the United States District Court or in the United States Court of Claims by reason of the requirement of *Flora v United States*, 362 US 145 (1960), decision on rehearing, 357 US 63 (1958), to the effect that a taxpayer must pay the full amount of what income tax the government says he owes for any period before the taxpayer may sue for the refund of any part there-

[2] See footnote 2, *supra*.

of, and plaintiff is wholly unable to comply with such requirement as his only asset is real estate, which would have to be sold in order for the taxes to be paid. Under 28 U.S.C. § 1346(a)(1), District Courts shall have jurisdiction concurrent with the Court of Claims. However, concurrent jurisdiction does not exist because the plaintiff's objections are based on religious beliefs and consequently, the Appellate Division of the Internal Revenue Service does not have jurisdiction.

25. The plaintiff alleges that the tax sought to be enjoined is illegally levied since it is a denial of the Equal Protection of the Laws Clause of the Fourteenth Amendment to the Constitution of the United States in that the tax is not levied upon self-employed members of the Old Order Amish but is only levied upon those members of the Old Order Amish who work for others.

26. Equity jurisdiction should intervene in that special extraordinary circumstances exist since the plaintiff has been denied access to the Appellate Division of the Internal Revenue Service, and the Tax Court, and he is unable to completely comply with the requirement of *Flora v. United States*, 357 US 63 (1958), because of the reason alleged herein; and equity jurisdiction should intervene since the tax levied is illegal in that it clearly is in violation of the Equal Protection Clause of the United States Constitution.

27. This suit for preventative injunctive relief should be granted and the Anti-Injunction Act of the Internal Revenue Code 26 USCS 7421(a) should not be applied since the government cannot ultimately prevail in this matter and equity jurisdiction should otherwise exist because of the reasons set forth elsewhere herein.

28. Defendants now threaten to immediately levy on and sell plaintiff's property to satisfy the illegal and void assessment.

29. Plaintiff has no adequate remedy at law, as herein above set forth, and there is no way of testing plaintiff's liability short of violation.

30. Plaintiff will suffer irreparable injury unless Defendant is enjoined, both permanently and during the pendency

of this action, and, pending the hearing on the preliminary injunction, is temporarily restrained, from collection of this tax because enforcement of the tax against Plaintiff would impose a tax that Plaintiff is unable to pay and would subject Plaintiff to heavy penalties and the possible forfeiture of all of his possessions and property.

31. The injunctive relief herein prayed is not precluded by 26 U.S.C. § 7421(a), because the assessment is illegal and void, and enforcement of the tax against Plaintiff would lead to the imminent destruction of Plaintiff's business, would ruin Plaintiff financially, and would inflict losses for which Plaintiff has no adequate remedy at law.

WHEREFORE, Plaintiff prays for judgment as follows:

32. That the above complained of federal tax statute be adjudged illegal and invalid as applied to and assessed against Plaintiff Lee.

33. That Defendants be enjoined, both permanently and during the pendency of this action, and, pending the hearing on the preliminary injunction, temporarily restrained from collection or attempting to collect from Plaintiff any federal social security tax purported to be assessed under the above referenced federal tax statute.

34. Grant Plaintiff the costs of this action, including interest on the total sum awarded at a rate of six (6%) percent, reasonable attorney's fees, to be paid by Defendants.

35. Grant an order for such other and further relief as the Court may deem necessary and proper and to declare the rights and other legal relations of any interested party seeking such declaration.

COUNT TWO

36. The facts set forth in the previous paragraphs of this Complaint are incorporated in Count Two of this Complaint by reference.

37. On January 18, 1979 the Plaintiff paid to the Internal Revenue Service the sum of Ninety-one ($91.00) Dollars, which sum was a tax against the Plaintiff.

38. The said Ninety-one ($91.00) Dollars assessment was identified as F.I.C.A. taxes.

39. On January 18, 1979, the Plaintiff filed a claim for a refund, and by letter dated March 15, 1979, the claim for adjustment was fully disallowed, in that under Section 6201 and Section 6205 of the Internal Revenue Code, the Plaintiff was deemed liable for the tax.

WHEREFORE, Plaintiff prays for judgment as follows:

40. That the above complained of federal tax statute be adjudged illegal and invalid as applied to and assessed against Plaintiff Lee.

41. That Defendants be enjoined, both permanently and during the pendency of this action, and, pending the hearing on the preliminary injunction, temporarily restrained from collection or attempting to collect from Plaintiff any federal social security tax purported to be assessed under the above referenced federal tax statute.

42. Grant Plaintiff the costs of this action, including interest on the total sum awarded at a rate of six (6%) percent, reasonable attorney's fees, to be paid by Defendants.

43. Grant an order for such other and further relief as the Court my deem necessary and proper and to declare the rights and other legal relations of any interested party seeking such declaration.

44. That the Ninety-one ($91.00) Dollars paid to the Internal Revenue Service be refunded to the Plaintiff.

Respectfully submitted,

CAIAZZA & LAMANCUSA

BY _____

FRANCIS X. CAIAZZA, ESQ.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 79–739

[filed August 14, 1979]

EDWIN D. LEE, PLAINTIFF

v.

UNITED STATES GOVERNMENT AND INTERNAL REVENUE SERVICE AND JEROME KURTZ, COMMISSIONER, INTERNAL REVENUE SERVICE, DEFENDANTS

ANSWER TO AMENDED COMPLAINT

Defendants, United States of America, etc., through their attorney, Robert J. Cindrich, United States Attorney for the Western District of Pennsylvania, answer the plaintiff's Amended Complaint and state that they:

1. Deny the allegations of paragraph 1.
2. Deny the allegations of paragraph 2.
3. Deny the allegations of paragraph 3.
4. Deny the allegations of paragraph 4.
5. Deny the allegations of paragraph 5.
6. Deny the allegations of paragraph 6.

Parties

7. Admit the allegations of paragraph 7.
8. Admit the allegations of paragraph 8.
9. Admit the allegations of paragraph 9.
10. Admit the allegations of paragraph 10.
11. Admit the allegations of paragraph 11.
12. Admit the allegations of paragraph 12.
13. Admit the allegations of paragraph 13.

Count One

14. Admit the allegations of paragraph 14.
15. Admit the allegations of paragraph 15.
16. Deny the allegations of paragraph 16.

17. Admit the allegations of paragraph 17.

18. Admit the allegations of paragraph 18.

19. Admit the allegations of paragraph 19.

20. Deny the allegations of paragraph 20.

21. Deny the allegations of paragraph 21.

22. Deny the allegations of paragraph 22.

23–26. Paragraphs 23 through 26 present legal arguments and are not proper allegations of fact and they are, therefore, denied.

27. Deny the allegations of paragraph 27.

28. Deny the allegations of paragraph 28.

29. Deny the allegations of paragraph 29.

30. Deny the allegations of paragraph 30.

31. Deny the allegations of paragraph 31.

WHEREFORE, defendants pray that plaintiff's claims for relief numbered 32 through 35 be denied and that Count One be dismissed, with prejudice.

Count Two

36. Answers as set forth in the previous paragraphs to this Answer are incorporated herein.

37. Admit the allegations of paragraph 37.

38. Admit the allegations of paragraph 38.

39. Admit the allegations of paragraph 39.

WHEREFORE, defendants pray that the plaintiff's claim for relief numbered 40 through 44 be dismissed and that Count Two be dismissed with prejudice.

Defendants further request that they be awarded costs and such further relief as this Court may deem proper.

ROBERT J. CINDRICH
United States Attorney

By:_____
Assistant United States Attorney

OF COUNSEL

GREGORY S. HREBINIAK
Trial Attorney
Tax Division
Department of Justice
Washington, D.C. 20530
Telephone: (202) 724-6438

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the foregoing ANSWER TO AMENDED COMPLAINT has this 8th day of August, 1979, been properly served on opposing counsel by mailing copies thereof to:

Francis X. Caiazza, Esquire
302 Central Building
New Castle, Pennsylvania 16101

/s/ _____
GREGORY S. HREBINIAK

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 79–739

[filed November 14, 1979]

EDWIN D. LEE

v

UNITED STATES GOVERNMENT AND INTERNAL REVENUE SERVICE AND JEROME KURTZ, COMMISSIONER, INTERNAL REVENUE SERVICE, DEFENDANTS

PRETRIAL STIPULATION

It is stipulated between the parties that:

I. This is an action for:

To determine whether or not Sections 6201 and Section 6205 of the Internal Revenue Code of 1954 are illegal and invalid as applied to and assessed against the Plaintiff, Edwin D. Lee, who is a member of the Old Order Amish. This is a civil action for injunctive and declaratory relief arising under the First Amendment to the Constitution of the United States.

II. Jurisdiction:

(State basis and if facts relative to jurisdiction and/or venue, citizenship and jurisdictional amount are disputed or agreed)

Jurisdiction is founded upon Title 28 U.S.C. § 1340 and under the general equity jurisdiction of the Federal District Court because the illegality of the tax sought to be enjoined, and the circumstances, as appear in the Complaint, constitute such special, extraordinary, and exceptional circumstances as to constitute an exception to the Internal Revenue Code of 1954 § 7421(a), 26 U.S.C. § 7421(a).

Jurisdiction is also founded upon Title 28 U.S.C. §§ 2201 and 2202, granting any Court of the United States, in a case of actual controversy within its jurisdiction, the power to declare the rights and other legal relations of any interested party seeking such declaration and to grant further

necessary and proper relief based upon a declaratory judgment or decree.

Jurisdiction is also founded upon Title 28 U.S.C. § 1331(a) granting the District Courts original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of Ten Thousand ($10,000.00) Dollars exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

Jurisdiction is also founded upon Title 28 U.S.C. 1346.

III. Plaintiff's narrative statement of the case:

((Including particularly a statement of the plaintiff's theory of defendant's liability, plaintiff's injuries (personal and/or proprietary), and plaintiff's damages))

The Plaintiff is a member of the Old Order Amish, who is self-employed. The United States of American seeks to collect certain taxes from him which represents Social Security taxes which the Plaintiff failed to withhold from the pay of other members of the Old Order Amish, whom he employed.

The Internal Revenue Code provides an exemption from self-employment tax if a person can show that he is self-employed and is a member of a religious sect which follows the practice of making provisions for its dependent members. The exemption does not extend to those who work for others.

If Social Security taxes were withheld from employees who are members of the Old Order Amish, it would deny to them the same rights afforded to members of the Old Order Amish who are self-employed, as guaranteed by the due process and equal protection clauses of the Fourteenth Amendment of the United States Constitution.

If Social Security taxes were withheld from employees who are members of the Old Order Amish, it would be an infringement upon their religious rights; and by forcing Old Order Amish employers to withhold such tax, or to pay this tax if it is not withheld, is an infringement upon their religious freedom as protected by the establishment and freedom of religion clauses of the First Amendment of the United States Constitution.

* * * * *

VI. The following facts are stipulated by the parties and require no proof: (Here list each stipulated fact)

(1) The Plaintiff is a member of the Old Order Amish and admits that he did not withhold any Social Security taxes from his employees, all of which were also members of the Old Order Amish faith.

(2) The Plaintiff, as an Amishman, is an adherent of established teachings which cause him to be conscientiously opposed to acceptance of Social Security benefits. A major principal of the Amish religion is the responsibility of the Amish for its own members. Commercial Insurance and Governmental Insurance Programs including the Federal Insurance Contributions Act are contrary to this religious principal.

(3) The Amish people belong to a religious sect which follows the practice of making provisions for its dependent members.

(4) The Internal Revenue Code provides an exemption from self-employment tax if a person can show he is a member of a religious sect which follows the practice of making provisions for its dependent members.

(5) In the event plaintiff prevails, plaintiff is at least entitled to judgment in the amount $91.00, plus statutory interest, representing a fully paid assessment for the first quarter of 1977.

(6) In the event defendant prevails, defendant is entitled to judgment in the amount of $13,871.66, plus statutory interest from dates of assessment, representing assessments of tax due from plaintiff:

(7) The Old Order Amish are conscientiously and religiously opposed to the acceptance of any public insurance which makes payments in the event of death, disability, old age, or retirement or makes payments toward the cost of, or provides services for medical care, including the benefits of any insurance system established by the Social Security Act.

(8) The Old Order Amish is a bona fide religious organization and recognized as such by both the United States Government and the Internal Revenue Service.

VI. (continued)

Quarter Ending	*Amount*	*Quarter Ending*	*Amount*
June '70	657.47	March '74	677.23
Sept '70	679.63	June '74	183.45
Dec '70	610.75	Sept '74	169.87
March '71	238.95	Dec '74	259.33
June '71	496.10	March '75	171.82
Sept '71	251.95	June '75	272.14
Dec '71	502.81	Sept '75	536.76
March '72	404.47	Dec '75	618.97
June '72	526.16	March '76	410.14
Sept '72	705.78	June '76	816.84
Dec '72	1,022.18	Sept '76	798.11
March '73	456.02	Dec '76	346.44
June '73	575.53	June '77	176.50
Sept '73	379.06	Sept '77	398.08
Dec '73	280.92	Dec '77	248.20

VII. Uncontested facts:

The following facts, though not admitted, are not to be contested at the trial by evidence to the contrary:

A major principal of the Amish religion is the responsibility of the Amish for its own members. Commercial insurance and governmental insurance programs, including the Federal Insurance Contribution Act, are contrary to this religious principle.

The Amish believe that old age survivors insurance is abridging and infringing to their religious freedom. They believe that their faith is sufficient to meet their needs as they come. They believe, as the Bible says, "But if any provide not . . . for those of his own house, he hath denied the faith, and is worse than an infidel." (I Timothy 5:8)

The Amish believe that to pay F.I.C.A. tax is to admit that the government has a responsibility for aged Amish members, although they do not collect Social Security benefits, and to admit this is to deny their own responsibility, one of their main religious principals.

No Amish employee, for whom assessment against Mr. Lee has been placed, has ever accepted any Social Security benefits.

Mr. Lee has never accepted any Social Security benefits.

The members of the Old Order Amish consider it a sin against God to pay money into the Social Security System, either directly through their employer or by themselves.

Members of the Old Order Amish who are employers consider it a sin to withhold Social Security benefits from the pay of employees who are members of the Old Order Amish.

VIII. The exhibits to be offered at the trial, together with a statement of all admissions by and all issues between the parties with respect thereto are as follows:

> (Here list all documents and things intended to be offered at the trial by each party in the sequence proposed to be offered, with a description of each sufficient for identification and a statement of all admissions by and all issues between any of the parties as to the genuineness thereof, the due execution thereof, and the truth of the relevant matters of fact set forth therein or in any legend affixed thereto, together with a statement of any objection reserved as to the admissibility in evidence thereof: if no objections are noted following the description of an exhibit, the parties thereby agree to the admission of the exhibit).

There will be no exhibits on behalf of the plaintiff.

IX. A complete list of all witnesses follows:

> (If any witnesses are to be called as experts, an expert's report must be filed in compliance with Local Rule 5 II C.)

1. Edwin Lee
2. The Bishop of the area in which Mr. Lee resides.

X. Issues of law:

The following issues of law are contested and remain to be litigated upon the trial.*

---

*A brief should be filed by each of the parties setting forth the authorities in support of their respective legal positions.

Whether or not the tax levied is in violation of the Equal Protection Clause of the United States Constitution.

Whether or not the tax levied is an infringement upon the religious beliefs of the Old Order Amish.

XI. Stipulation:

The foregoing admission of fact having been made, and the parties having specified the issues of fact and law remaining to be litigated, this stipulation shall supplement the pleadings and govern the course of the trial unless modified to prevent injustice.

STIPULATED AND AGREED BY:

/s/ _____
Attorney for Plaintiff

_____
Attorney for Defendant

/s/ _____
Attorney for 3rd Party Defendant

Note: If sufficient space is not available under any title of this stipulation to set forth all matters, attach a supplemental paper of the same size as this form.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 79–739

AMENDED PRE-TRIAL STIPULATION

EDWIN D. LEE

vs

UNITED STATES GOVERNMENT AND INTERNAL REVENUE SERVICE AND JEROME KURTZ, COMMISSIONER, INTERNAL REVENUE SERVICE, DEFENDANTS

It is stipulated between the parties that:

Should the government prevail in litigating the key issues raised in the plaintiff's Complaint, a judgment of social security taxes due, not barred by any applicable Statute of Limitations, will be entered against the Plaintiff; the said amount to be mutually agreed upon by the plaintiff and defendant.

STIPULATED & AGREED BY:

/s/ _____
Attorney for Plaintiff

/s/ _____
Attorney for Defendant

Supreme Court of the United States

No. 80-767

UNITED STATES, APPELLANT,

v.

EDWIN D. LEE

APPEAL from the United States District Court for the Western District of Pennsylvania.

The statement of jurisdiction in this case having been submitted and considered by the Court, in this case probable jurisdiction is noted.

March 23, 1981

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SUPREME COURT, U.S.

80-767

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No.

UNITED STATES OF AMERICA, APPELLANT

v.

EDWIN D. LEE

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Edwin D. Lee, appellee, respectfully moves the Court for leave to proceed herein in forma pauperis, in accordance with the provisions of Title 28, United States Code, Section 1915, and file a Motion to Affirm in response to the Jurisdictional Statement filed by the United States of America, in single counterpart, without printing the same. The typed Motion to Affirm Judgment is presented herewith for filing.

The Affidavit of Edwin D. Lee, appellee, in support of this motion is filed herewith.

Respectfully submitted,

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By Francis X. Caiazza

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IN THE SUPREME COURT OF THE UNITED STATES

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EDWIN D. LEE

AFFIDAVIT

COMMONWEALTH OF PENNSYLVANIA (
:
COUNTY OF LAWRENCE)

Edwin D. Lee, being duly sworn, on oath deposes and says:

1. That he is the appellee in the above-entitled action and makes this affidavit in support of his motion for leave to proceed in forma pauperis herein.

2. Affiant is unable because of his poverty to pay fees and costs of this case or give security therefor.

3. This is a Motion to Affirm Judgment, and the affiant believes that he is entitled to the relief therein sought.

Edwin D. Lee
Edwin D. Lee

Sworn and subscribed before me,

this 17th day of February, 1981.

Francis X. Caiazza
Notary Public

FRANCIS X. CAIAZZA, NOTARY PUBLIC
NEW CASTLE, LAWRENCE COUNTY
MY COMMISSION EXPIRES MAY 30, 1981
Member, Pennsylvania Association of Notaries

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No.

UNITED STATES OF AMERICA, APPELLANT

v.

EDWIN D. LEE

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
WESTERN DISTRICT OF PENNSYLVANIA

MOTION TO AFFIRM JUDGMENT

QUESTION PRESENTED

Whether Sections 3101, 3111 and 3301 of the Internal Revenue Code of 1954, which impose social security taxes on employers and employees, is constitutional as applied to persons who object, on religious grounds, both to the payment of such taxes levied to support public insurance benefits and to the receipt of such benefits.

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JURISDICTION

The judgment order of the district court was entered on July 15, 1980 (App. B, infra 9a). A notice of appeal to this Court was filed on August 14, 1980 (App. C., infra, 10a). The jurisdiction of this Court rests on 28 U.S.C. 1252, which authorized a direct appeal to this Court from a final judgment of a court of the United States holding an Act of Congress unconstitutional in a civil action to which the United States is a party. A direct appeal lies where, as here, a statute is held unconstitutional as applied to particular circumstances. Fleming v. Rhodes, 331 U.S. 100 (1947); see United States v. Christian Echoes Ministry, Inc. 404 U.S. 561, 563 (1972); United States v. American Friends Service Committee, 419 U.S. 7 (1974).

STATUTES INVOLVED

Sections 1402(g), 3101, 3102, 3111 and 3301 of the Internal Revenue Code of 1954 (26 U.S.C.), are set forth in App. D, infra, 11a-15a.

STATEMENT

The Appellee, Edwin D. Lee, is a member of the Old Order Amish, which is a bona fide religious order recognized as such by both the United States Government and the Internal Revenue Service. The United States of America sought to collect certain taxes from him which represents Social Security Taxes which the Appellee failed to withhold from the pay of other members of the Old Order Amish, whom he employed.

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Mr. Lee paid a portion of the taxes due which were identified as F.I.C.A. taxes. On January 18, 1979 the Appellee filed a claim for a refund, and by letter dated March 15, 1979, the claim for adjustment was fully disallowed, in that under Section 6201 and Section 6205 of the Internal Revenue Code, the Appellee was deemed liable for the tax.

ARGUMENT

The Appellee, Edwin D. Lee, is a member of the Old Order Amish Faith and community; a community which has been recognized by the United States Supreme Court as ". . . a highly successful social unit within our society" and one which ". . . reject(s) public welfare in any of its usual modern views" and "congress has recognized such groups as the Amish as exempt from the obligation to pay Social Security taxes". Wisconsin v. Yoder, 406 US 205 (1972).

The exemption under Title 26 USC (1402)h has taken a form which exempts only those members of Old Order Amish who are self-employed. Thus, under this Act, a member of the Old Order Amish faith who employs other members of the Old Order Amish must still collect and pay into the Social Security fund on behalf of his employees.

The government has stipulated that the Appellee is a member of the Old Order Amish who failed to withhold Social Security taxes from his employees, all of which were also Old Order Amish members. The government also stipulates to the fact that the Amish

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religion prohibits payment into any insurance programs and that members of this sect makes provision for its dependent members.

In addition to these and other stipulated facts, it is uncontested by the government that the members of the Old Order Amish consider it a sin against God to pay money into the Social Security system, either directly through their employer or by themselves and that employers who are Old Order Amish consider it a sin to withhold Social Security taxes from the pay of employees who are members of the Old Order Amsih.

Thus, because of these stipulations and uncontested facts the primary issue of the instant case becomes whether the requirement that Edwin Lee, an Old Order Amish employer, pay into the Social Security program when it is in direct conflict with the precepts of his religion, is a violation of the freedom of religion clause of the First Amendment of the United States Constitution.

LEGISLATIVE HISTORY

A review of the legislative history (U.S.C. Congressional and Administrative News, 1965) shows that an exemption is made for those self-employed members of a bona fide religious group opposed to the acceptance of any public insurance which makes payments in the event of death, disability, old age, or retirement or makes payments toward the cost of, or provides services for medical care, including the benefits of any insurance system established by the Social Security Act.

The express purpose of the Act is to provide relief for

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those individuals who sincerely believe that payment of Social Security taxes is irreconcilable with their religious conviction.

The writers also cautioned that any broadening could well lead to widespread individual voluntary coverage under Social Security which would undermine the soundness of the Social Security program. This caution is clearly not appropriate in a situation where, as here, the small group of people comprising the Old Order Amish have been consistent in their refusal to accept any benefits from the Social Security program nor any other insurance program. In fact, the Appellant has stipulated to the fact that no Amish employee, for whom assessment against Mr. Lee has been placed, has ever accepted any Social Security benefits. Thus, inclusion of the catagories in this case within the exemption would not be contrary to the intent of the legislation and would, in fact, enhance its purpose.

FREEDOM OF RELIGION

The Appellee's religious beliefs prevent him from paying Social Security taxes. Payment of Social Security taxes or into any insurance fund is regarded as a sin and contrary to one of the very basic tenets of the Old Order Amish Faith, for they believe as the Bible says, "But if any provide not. . .for those of his own house, he hath denied the faith, and is worse than an infidel." (I Timothy 5:8)

The Appellee is required as a member of the Old Order Amish to collect for and pay into the Social Security program on behalf of his employees, all of whom are Old Order Amish. This requirement is in direct conflict with the tenets of his religion and is forbidden

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by the free exercise clause of the First Amendment. The free exercise clause, like the establishment clause, withdraws from legislative power, state and federal, the exercise of any restraint on the free exercise of religion. School District of Abington Township, Pa. v. Schenpp, 83 S. Ct. 1566, 374 US 203, 10 L. Ed. 2d 844 (1963). In this highly sensitive area "it is basic that no showing merely of a rational relationship to some colorable state interest would suffice." Sheibert v. Verner, 374 US 398, S. Ct. 790, 10 L. Ed. 2d 965B (1963).

The requirement that demands that Appellee become both a tax collector for the Social Security program and to pay into the program must have a compelling state interest to justify it when the requirement is in direct conflict with his religion. Such a compelling interest cannot exist where an exemption has been granted for self-employed Old Order Amish, and, within the purpose of such exemption, the catagories of payors in the instant case would fit without destroying the caution included in the history of the Act. "Only the gravest abuses endangering paramount interest, give occasion for permissible limitation." Thomas v. Collins 323 US 516, 530. Under the facts of the instant case, no such abuse or danger appears as would justify the limitation on the practice of the Old Order Amish religion.

It must be emphasized that this is not a case in which Appellee or other members of his group are seeking a free ride in order, at some future date, to collect under the Social Security program after never having paid into it. But rather, the group of Old Order Amish as a whole have consistently rejected any claim to benefits under the program and have consistently provided for other members of their

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group as well as their extended family, thereby making the group self-sufficient.

The Old Order Amish and their beliefs and practices are worthy of preservation. The government should not discourage such practice by forcing members of this group to obey a law which is in direct conflict with a basic tenet of their religion. Diversity among the peoples of the United States is of unquestioned importance and such diversity must be preserved.

Without question, a major principle of the Amish religion is the responsibility of the Amish for its own members. Commercial insurance and governmental insurance programs, including the Federal Insurance Contribution Act, are contrary to this religious principle. The Appellant's interest in the social well-being of its citizens should not be free from a balancing process whenever it infringes upon other fundamental rights and interest, such as those specifically protected by the free exercise of religion clause of the First Amendment.

In order for the Appellants to force Mr. Lee to perform an act which he considers to be a sin and against his basic religious beliefs, it must appear either that the government does not deny the free exercise of religious beliefs by its requirement, or that there is a governmental interest of sufficient magnitude to override the interest claiming protection under the free exercise of religion clause. Wisconsin v. Yoder, 406 US 205, 32 L. Ed. 2d 15, 92 S. Ct. 1526.

Does the government deny Mr. Lee the free exercise of his religion by requiring him to pay into the Social Security system? We think so.

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There can be no question that by forcing Mr. Lee to pay money into the Social Security System is denying him the free exercise of his religion, since by paying into the system, he is, stated very simply, committing a sin. The Amish believe that there is only one pervasive set of values and differences which arise are considered heresies. These people have one system of values and whenever changes in the established tradition are threatened, they are looked upon as serious offenses by the entire sect. To them, it makes no difference whether you are an employer or employee. Consequently, in every part of their life, the prevailing beliefs and traditions are re-affirmed, including their belief against insurance. In their life also, a strict religious atmosphere prevails, which underlines these beliefs with a sense of compulsion which strikes deeply in the conscience of every Amishman. Some time ago, the government seized cows from a Pennsylvania Amishman who refused to pay the Old Age and Survivors Insurance Tax. If the tax was paid, the Amishman would have admitted that the government has a responsibility for aged Amish members, and to admit that is to deny their own responsibility, one of their main religious principles.

Next, is there a governmental interest of sufficient magnitude to override the interest claiming protection under the free exercise of religion clause? We think not.

The Amish believe that their faith is sufficient to meet their needs as they come. He shuns commercial forms of insurance, for, in his judgment, he already has the best kind of insurance. If a barn burns down, the neighbors are there to help him build a new one.

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If he beomes ill, they do his work. Should he die suddenly, they make arrangements to have the farm operation continue.

Amish mutual aid provides "Social Security" for its members from birth to death. Security comes from friendly personal relations. It is their belief that responsibility for mutual aid stems from father and mother, brother and sister, uncle and aunt, and church members, and not from impersonal and remote sources, such as investment bonds or state security. Consequently, mutual aid is practiced by the Amish as a religious belief.

It is important to note that the Amish do not object to paying income taxes; they do object to receiving government aid or having their children and grandchildren fall heir to such a temptation. Consequently, the need or interest which the government is attempting to meet has already been met by the Amish people. The Amishman who lives by his standards enjoys a secure and self-sufficient family and community life, without the aid of the Federal Government. No matter how strong the government's interest is in a mutual security system, it should not be contrary to the religious beliefs of the Amish people as it affects them as a group.

In Wisconsin v. Yoder, supra, at page 215, the Supreme Court of the United States said:

> . . . . In evaluating those claims (that compulsory school-attendance statute beyond the 8th grade was in violation of the Freedom of Religion clause of the First Amendment) we must be careful to determine whether the Amish religious faith and their mode of life are, as they claim, inseparable and interdependant.

Again, in Yoder, supra, the history of the Amish sect

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was explained in great detail, beginning with the Swiss Anabaptists, as stated on page 210 of Yoder:

> . . . . they (Swiss Anabaptists) sought to return to the early simple, christian life, de-emphasizing material success, rejecting the competitive spirit, and seeking to insulate themselves from the modern world. As a result of their common heritage, Old Order Amish communities today are characterized by a fundamental belief that salvation requires life in a church community separate and apart from the world and worldly influence. This concept of life aloof from the world and its values is central to their faith.

By considering the stipulations entered into by the parties, it is apparent that the Amish do not support the traditional norms of our society, such as insurance, and that their objection is not a matter of personal preference, but rooted in deep religious conviction. They have held loudly and firmly to St. Paul's edect "be not conformed to this world. . ." Their life is simple, their belief is simple, their total existance, from days beginning to days end is guided by their desire for the salvation of their soul, and their total existence is directed toward that end.

Laws which threaten their interdependence also threaten their religious beliefs and their continued existence as a religious society. Their belief of mutual aid is not based upon economic principles, personal individual beliefs, or even their desire not to conform to majority standards. Simply, their belief is based upon a major principle of the Amish religion--that is, his own responsibility for his own brother, firmly intrenched within a people which follows the practice of making provisions for its dependent members.

In sum, the personal impact of forcing an Amishman to

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pay money into a system which provides governmental benefits is to admit that the government has a responsibility for aged Amish members and to admit this is to deny their own responsibility.

The present state of the law as it relates to Amish employers and employees is also very interesting.[1]

In Yoder, supra, at page 222, the Supreme Court of the United States said:

> ". . . . the Amish community has been highly successful social unit within our society, even if apart from the conventional ("mainstream"). Its members are productive and very law-abiding members of society; they reject public welfare in any of its usual modern forms. The Congress itself recognized their self-sufficiency by authorizing exemption of such groups as the Amish from the obligation to pay social security taxes."

The quote taken from Yoder, supra, is not altogether correct in substance. Congress has exempted Amishman who are self-employed by virtue of 26 USC 1402(h). No exemption exists for Amishman who are employees. However, the important aspect of the law is that Congress has recognized the fact that an individual can object and be conscientiously opposed to the payment (emphasis added) of a tax, which objection is bottomed upon a religious belief. It is interesting to note that the history of the exemption shows it became law because of the beliefs of the Old Order Amish. HR Rep. No. 213, 89th Cong. 1st Sess., 101-102 (1965).

---

[1] 26 USC 1402(h) Exemption--Any individual may file an application (in such form and manner, and with such official, as may be prescribed by regulations under this chapter) for an exemption from the tax imposed by this chapter if he is a member of a recognized religious sect or division thereof and is an adherent of established tenets or teachings of such sect or division by reason of which he is conscientiously opposed to acceptance of the benefits of any private or public insurance which makes payments in the event of death, disability, old-age, or retirement or makes payments toward the cost of, or provides services for, medical care (including the benefits of any insurance system established by the Social Security Act).

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CONCLUSION

The Amish alternative to Social Security has worked well within their system. Consequently, they are capable of fulfilling the needs of their people. Their mutual care and assistance to one another is strongly rooted within their religious belief, and is not philosophical or economical in nature. It is part of their religion. Again, their objection is rooted strongly in their belief that Social Security is insurance. To become part of that program, directly or indirectly, exhibits mistrust in the providence of God and His care to meet their future needs.

Respectfully submitted,

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80-767

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No.

UNITED STATES OF AMERICA, APPELLANT

v.

EDWIN D. LEE

AFFIDAVIT OF SERVICE

STATE OF PENNSYLVANIA :
: SS
COUNTY OF LAWRENCE :

I, Francis X. Caiazza, Esquire, depose and say that I am the attorney of record for the above appellee and that I served a copy of the Motion for Leave to Proceed in Forma Pauperis and Affidavit attached thereto, as well as the Motion to Affirm Judgment, as follows: on Wade H. McCree, Jr., Solicitor General of the United States, by mailing copies in a duly addressed envelope, with first-class postage pre-paid at his office as follows:

Office of the Solicitor General
Department of Justice
Washington, D.C. 20530

Francis X. Caiazza, Esq.
Francis X. Caiazza, Esquire

Sworn and subscribed before me
this 17th day of February, 1981.

Beverly A. Leckfor
Notary Public

My Commission Expires:

BEVERLY A. LECKFOR, Notary Public
New Castle, Lawrence Co.
My Commission Expires April 16, 1984

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CLERK

No. 80-767

In the Supreme Court of the United States

OCTOBER TERM, 1980

UNITED STATES OF AMERICA, APPELLANT

v.

EDWIN D. LEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether Sections 3101, 3102, 3111 and 3301 of the Internal Revenue Code of 1954 (26 U.S.C.), which impose certain social security taxes on employers and employees, are constitutional as applied to persons who object, on religious grounds, both to the payment of taxes levied to support such benefits and to the receipt of such benefits.

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In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-767

UNITED STATES OF AMERICA, APPELLANT

v.

EDWIN D. LEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

BRIEF FOR THE UNITED STATES

OPINION BELOW

The findings of fact and conclusions of law of the district court (J.S. App. 1a-8a) are reported at 497 F. Supp. 180.

JURISDICTION

The judgment order of the district court was entered on July 15, 1980 (J.S. App. 9a). A notice of appeal to this Court was filed on August 14, 1980 (J.S. App. 10a), and the Court noted probable jurisdiction on March 23, 1981 (A. 26). The jurisdiction of this Court rests on 28 U.S.C. 1252, which authorizes a direct appeal to this Court from a final judgment of a court of the United States holding an

Act of Congress unconstitutional in a civil action to which the United States is a party. A direct appeal lies where, as here, a statute is held unconstitutional as applied to particular circumstances. *Fleming* v. *Rhodes*, 331 U.S. 100 (1947); see *United States* v. *Christian Echoes Ministry, Inc.*, 404 U.S. 561, 563 (1972); *United States* v. *American Friends Service Committee*, 419 U.S. 7 (1974).

STATUTES INVOLVED

Sections 1402(g), 3101, 3102, 3111 and 3301 of the Internal Revenue Code of 1954 (26 U.S.C.) are set forth in the Appendix, *infra*, 1a-6a.

STATEMENT

1. Appellee is a member of the Old Order Amish religious sect. That sect seeks to preserve a way of life emphasizing the welfare of their religious community. A major tenet of the Old Order Amish faith is that each member must provide for the other members of the community who are in need of economic assistance. Because Old Order Amish members care for their aged, their sick, and their unemployed, they do not need any form of social welfare benefits from outside their self-sufficient community. Moreover, the Old Order Amish believe that it is a sin either to accept social security benefits or to pay social security taxes. Accordingly, members of the sect are not permitted by their religious beliefs to accept any benefits under the social security system, such as assistance for old age, death, disability or medical expenses (J.S. App. 3a). As the district court found, "[n]ot only is it considered a sin to *accept*, it is also considered a sin to *pay*, for to pay is to deny their faith" (*ibid.*; emphasis in original).

The social security system was established in 1935 by the Social Security Act, ch. 531, 49 Stat. 620, to provide a system of old age and unemployment benefits. The social security benefits are supported by various taxes, including a tax imposed by the Federal Insurance Contributions Act (FICA) on employees with respect to their wages (26 U.S.C. 3101),[1] an excise tax imposed by that Act on employers with respect to wages paid their employees (26 U.S.C. 3111), and a second excise tax imposed by the Federal Unemployment Tax Act (FUTA) on employers with respect to wages paid to employees (26 U.S.C. 3301).[2] In 1950, Congress extended the federal social security system to cover self-employed persons, and a concomitant tax on self-employment income to fund that coverage was enacted. See Social Security Act

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[1] The employer is required, pursuant to Section 3102(a) of the Code, to withhold the employee's tax from wages, and is liable for payment of that tax under Section 3102(b), whether or not he withholds the requisite amounts from his employees' wages.

[2] The Federal Unemployment Tax Act (FUTA), which is codified as Sections 3301 through 3311 of the Internal Revenue Code, is a coordinated federal-state unemployment compensation program. Section 3301 imposes an excise tax on most employers, now equal to 3.2 percent of the first $6,000 of wages paid each employee. Section 3301 and 3306(b)(1) of the Code. Under Section 3302, however, an employer is permitted to claim a credit against the FUTA tax for the employer's contributions to an unemployment fund maintained under state law, as long as the state's unemployment compensation law has been certified by the Secretary of the Treasury. Section 3302(a)(1). A certified state receives two kinds of federal grants related to its unemployment security program. One is the grant for the costs of administering the state's unemployment compensation program. 42 U.S.C. 501 through 503. The other is the grant for the administration of public employment offices. 29 U.S.C. 49 through 49n.

Amendments of 1950, ch. 809, Section 208(a), 64 Stat. 540, 26 U.S.C. (1952 ed.) 480 and 481.

In 1965, Congress added Section 1402(h) to the Internal Revenue Code. That section allows an exemption from the self-employment tax to persons who, by reason of their adherence to the established tenets or teachings of (and membership in) a "recognized religious sect or division thereof," are "conscientiously opposed to acceptance of the benefits of any private or public insurance" providing death, disability, old age, retirement or medical benefits.[3] This exemption is granted, however, only where the applicant waives all benefits under the Social Security Act (whether based on self-employment income or wages received as an employee) and where the Secretary of Health and Human Services has determined (1) that the particular sect has the requisite tenets or teachings; (2) that the sect has had, for a substantial period, the practice of making reasonable provision for its dependent members; and (3) that the sect has been in existence at all times since December 31, 1950.[4]

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[3] This statutory exemption originally designated as Section 1402(h) of the 1954 Code, was added to the Code by Section 319(c), of the Social Security Amendments of 1965, Pub. L. No. 89-97, 79 Stat. 391. Section 1402(h) of the Code was redesignated as Section 1402(g) by Section 1901(a)(155)(B) of the Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1789.

[4] Section 1402(e) of the Code also grants an exemption from the self-employment tax to ordained, commissioned or licensed ministers, certain members of religious orders and Christian Science practitioners who are opposed to the receipt of social security benefits on the grounds of conscience or religious principle. Prior to 1967, the exemption was automatic. It must now be affirmatively claimed, however, and applies only with respect to earnings derived from services performed as "such minister, member, or practitioner."

The legislative history shows that, in enacting the exemption in Section 1402(g), Congress specifically intended to benefit members of the Old Order Amish sect. It found the exemption justifiable where individual members of such a sect "cannot accept the benefits of insurance, including social security benefits, without renouncing basic tenets of * * * [their] religion" and "sincerely believe that payment of social security taxes is irreconcilable with their religious convictions." H.R. Rep. No. 213, 89th Cong., 1st Sess. 101-102 (1965). The proposal, however, was limited to the self-employment tax imposed by Section 1401 because Congress understood that such individuals, by reason of their religious beliefs, "limit their work almost entirely to farming and to certain other self-employment" (*ibid.*). Thus, Congress provided no statutory exemption from the employer and employee FICA taxes and the employer FUTA taxes at issue in this case. The applicability of FICA and FUTA with respect to wages that might be paid to such individuals was left undisturbed by the 1965 legislation.

2. During 1970-1977, appellee employed several other members of the Old Order Amish sect who worked on his farm and in his carpentry shop. He did not, however, either withhold income taxes or FICA taxes from their wages, or pay FUTA taxes or the employer's share of FICA taxes with respect to those wages. In 1978, the Internal Revenue Service assessed appellee for unpaid employment taxes for the years in issue in an amount exceeding $27,000. Appellee paid taxes in the amount of $91 attributable to wages paid to his employees for the first quarter of 1973. He thereafter instituted this proceeding in the United States District Court for the Western District of

Pennsylvania for a refund of the amount paid and for injunctive relief against the Commissioner of Internal Revenue with respect to the unpaid balance of the assessments. Appellee claimed that the imposition of FICA and FUTA taxes on the wages paid his fellow members of the Old Order Amish sect violated both his own rights and the rights of his employees under the Free Exercise Clause of the First Amendment of the Constitution (J.A. App. 1a-2a).[5]

The district court upheld appellee's claim.[6] It concluded that "the tax is declared invalid and unconstitutional" (J.S. App. 8a) on the ground that it infringed appellee's First Amendment right to free exercise of religion. In support of its ruling, the court relied upon the exemption provided by Section 1402(g) of the Code, even though that exemption relates only to the tax on income from self-employment and not to the employer's share of FICA and FUTA taxes on employees' wages or to the employees' share of the FICA taxes. It accordingly ruled that appellee "and employers who fall within the carefully circumscribed definition provided in 1402(g), are relieved from paying the employer's share of FICA and FUTA as it is an

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[5] The portion of the assessment representing income taxes required to be withheld from wages is not in issue in this case; it is to be abated because appellee's employees paid their own income taxes.

[6] The district court denied appellee's request for injunctive relief against the collection of the balance of the assessment because of the bar of the Anti-Injunction Act (26 U.S.C. 7421(a)) against such actions. It did so, however, "with the knowledge that the government has agreed not to collect such taxes during the pendency of this litigation and in the belief that the future collection activities will be circumscribed by the holding of this case" (J.S. App. 8a).

unconstitutional infringement upon the free exercise of their religion" (J.S. App. 8a).[7]

SUMMARY OF ARGUMENT

1. The judgment of the district court—holding unconstitutional the imposition of certain social security taxes upon appellee and his employees—has erroneously nullified an Act of Congress on grounds that have no basis in the decisions of this Court construing the Free Exercise Clause of the First Amendment.

The district court held that appellee, and similarly-situated employers who are members of the Old Order Amish, and who are conscientiously opposed to acceptance of any private or public insurance, are relieved from the payment of the employer's share of FICA taxes and FUTA taxes. But this conclusion cannot be squared with this Court's decisions construing the Free Exercise Clause of the First Amendment. To be sure, the Free Exercise Clause affords substantial protection for the diverse religious beliefs and practices in this country. This Court has held that the Free Exercise Clause prohibits governmental regulation of religious beliefs as such (*Cantwell* v. *Connecticut*, 310 U.S. 296, 303 (1940)), or governmental interference with the dissemination of religious ideas. See, *e.g.*, *Fowler* v. *Rhode Island*, 345 U.S. 67 (1953);

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[7] While the district court did not expressly conclude that the obligation to withhold the employees' share of FICA taxes from their wages, as required by Sections 3101 and 3102 of the Code, was also contrary to the First Amendment rights of the appellee or his employees, it implicitly so held since it recognized (J.S. App. 1a, 9a) that those taxes were also at issue here, and awarded a refund of the entire amount assessed and paid for the quarter in question.

Follett v. *Town of McCormick*, 321 U.S. 573 (1944). It also prohibits misuse of secular government programs "to impede the observance of one or all religions or * * * to discriminate invidiously between religions, * * * even though the burden may be characterized as being only indirect." *Braunfeld* v. *Brown*, 366 U.S. 599, 607 (1961). "And even as to neutral prohibitory or regulatory laws having secular aims, the Free Exercise Clause may condemn certain applications clashing with imperatives of religion and conscience, when the burden on First Amendment values is not justifiable in terms of Government's valid aims." *Gillette* v. *United States*, 401 U.S. 437, 462 (1971); see, *e.g.*, *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972).

It is equally well-established, however, that a person is not protected from every incidental burden on the exercise of his religion that may result from the implementation of a neutral, secular governmental interest. *Braunfeld* v. *Brown*, *supra*, 366 U.S. at 602; *Johnson* v. *Robison*, 415 U.S. 361, 383-386 (1974); *Gillette* v. *United States*, *supra*, 401 U.S. at 461-462; see *Prince* v. *Massachusetts*, 321 U.S. 158 (1944); *Reynolds* v. *United States*, 98 U.S. 145 (1878); *McDaniel* v. *Paty*, 435 U.S. 618, 635 n.8 (1978) (Brennan J., concurring in the judgment). See also *Wisconsin* v. *Yoder*, *supra*; *Johnson* v. *Robison*, *supra*. Accordingly, this Court has observed that a generally imposed income tax does not have a prohibited coercive effect on religious practices or beliefs. *Follett* v. *Town of McCormick*, *supra*, 321 U.S. at 577-578; *Murdock* v. *Pennsylvania*, 319 U.S. 105, 112 (1943); see *Braunfeld* v. *Brown*, *supra*, 366 U.S. at 606. Indeed, one can hardly imagine a more neutral secular activity that the payment of generally imposed

taxes such as the FICA and FUTA levies at issue here.

Sherbert v. *Verner*, 374 U.S. 398 (1963), and *Wisconsin* v. *Yoder*, *supra*, upon which the district court relied (J.S. App. 5a-8a), are therefore distinguishable. In both of these cases, the infringement on the exercise of the individual's religion was far more burdensome, in the face of a less compelling government interest, than here. In *Sherbert*, a member of the Seventh-Day Adventist Church was discharged by her employer because she would not work on Saturday, the Sabbath Day of her faith. She was unable to obtain other employment in the vicinity where she lived because of her religious belief that she could not work on Saturday. South Carolina denied the appellant's claim for unemployment benefits on the ground that she failed without reasonable cause to accept available employment. This Court held that disqualification of a Seventh-Day Adventist from unemployment compensation solely because of her refusal to accept employment in which she would have to work on Saturday violated the Free Exercise Clause. The appellant in *Sherbert* was faced with a constitutionally unacceptable choice. She had to give up either her Sabbath Day or her economic means of survival. A similar choice was involved in *Thomas* v. *Review Board*, No. 79-952 (Apr. 6, 1981), in which the petitioner terminated his employment when he was assigned to armament production. Appellee faces no similar choice here.

Similarly, in *Yoder*, this Court upheld the claim of members of the Old Order Amish sect that enforcement against them of a state compulsory formal ed-

ucation requirement after the eighth grade would violate the free exercise of their religion. The interest of the state in requiring an additional one or two years of formal high school attendance was deemed insufficient against the claim that state formal education during the crucial adolescent years would expose the children to worldly influences, and thereby threaten the religious survival of the Old Order Amish parents as well as their children. The choice faced by the Amish parents in *Yoder* thus was either to risk losing their children from their faith or to violate the law. No such choice need be made here. Although appellee claims that the payment of the tax would be a sin, it does not, as did the burdens in *Sherbert* and *Yoder*, threaten the integrity of his religious beliefs or observances. See also *McDaniel* v. *Paty, supra; Torcaso* v. *Watkins*, 367 U.S. 488 (1961).

2. The district court found that members of the Old Order Amish sect consider it to be a sin to accept social security benefits and to pay social security taxes because "it is a sin to fail to provide for or to allow another to provide for your own people" (J.S. App. 3a). But the payment of FICA and FUTA taxes does not prevent appellee from providing for his own people, nor are he or any of his employees forced to accept social security benefits. The Old Order Amish can protect the integrity of their own religious beliefs and practices simply by declining to accept social security benefits and by continuing to provide support for those members of their community who are in need. The payment of FICA and FUTA taxes no more commits appellee or other members of

the Old Order Amish sect to a binding insurance contract in violation of their religious beliefs than does the payment of federal income taxes, which are used to support a myriad of governmental expenditures and benefits, many of which they or various other religious groups may oppose. See *United States* v. *American Friends Service Committee*, 419 U.S. 7 (1974).

Finally, in contrast to the very limited effect that FICA and FUTA taxes have on the exercise of appellee's religion, the governmental interest in maintaining widespread participation in the social security program is of great importance. The government's ability to maintain a comprehensive social security program for the nation's unemployed and senior citizens would be severely strained if all those who could provide for themselves, either by individual or community efforts, could voluntarily withdraw from the program. The Free Exercise Clause has never been construed to interfere with such a fundamental societal activity as the levying of generally imposed federal taxes.

3. Contrary to the reasoning of the district court, the Section 1402(g) religious exemption from the tax on self-employment income does not support appellee's claim to exemption from the employer's tax on wages. Since Section 1402(g) was enacted, there have been various constitutional challenges by taxpayers who sought either to have the statute set aside or to have the exemption extended to themselves, despite their failure to satisfy all of its conditions. But the courts have uniformly rejected these claims. The courts that have reached the question have concluded that the exemption pro-

vided by Section 1402(g) is constitutionally permissible and, until the decision below, no court has ever suggested that it is constitutionally required under the Free Exercise Clause.

Thus, while Congress as a matter of legislative grace may have permissibly made this accommodation to the religious beliefs and social practices of members of the Old Order Amish sect, it is not compelled to do so by the Free Exercise Clause or any other provision of the Constitution. Once having granted this statutory exemption from the tax imposed by Section 1401 on income from self-employment, Congress was under no constitutional compulsion to extend a similar exemption to employers and employees from the FICA and FUTA taxes imposed by Sections 3101, 3111 and 3301 of the Code.

The limitation in the Section 1402(g) exemption to the self-employment tax is in accord with the decisions of this Court holding that Congress has considerable discretion in the classification of taxpayers in implementing the social security system. *Carmichael* v. *Southern Coal Co.*, 301 U.S. 495 (1937); *Steward Machine Co.* v. *Davis*, 301 U.S. 548 (1937). Self-employed persons were generally not covered by the social security system at all until 1950 (Social Security Act Amendments of 1950, ch. 809, Section 208(a), 64 Stat. 540), and even now self-employed persons are taxed on a substantially different basis from employed individuals. Sections 1401 and 1402. In light of the decisions in *Helvering* v. *Davis*, 301 U.S. 619 (1937); *Carmichael* v. *Southern Coal Co.*, *supra*, and *Steward Machine Co.* v. *Davis*, *supra*, it could hardly be contended that the distinction drawn between self-employed persons and em-

ployees under either the original provisions of the Social Security Act or its present provisions is unconstitutional. The specific distinction drawn in Section 1402(g) between self-employed adherents of the Old Order Amish sect and members of that sect who employ or are employed by others is no more suspect as a matter of either Due Process or First Amendment considerations, than the distinctions that have been drawn between employed and self-employed persons generally.

The classification made in Section 1402(g) involves at most a difference in the tax treatment accorded employed and self-employed members of the same religious sect. Moreover, since appellee himself is treated in precisely the same manner, with respect to the FICA and FUTA taxes in question, as any other similarly situated employer, regardless of his religious beliefs, he can hardly complain that, as to himself, Section 1402(g) reflects an improper classification under either the Due Process Clause or the Free Exercise Clause.

At all events, we submit that Congress had a rational basis for limiting the Section 1402(g) exemption to the tax imposed on self-employment income under Section 1401 of the Code. The legislative history of Section 1402(g) shows that Congress was concerned that there should be no broad exception to the strongly held policy against making participation in the social security system a voluntary matter. Thus, the exemption was limited to the self-employment tax "since those persons for whom the payment of social security taxes appears to be irreconcilable with their religious convictions also, by reason of their religious beliefs, limit their work almost entirely to farming and to certain other self-employment." H.R.

Rep. No. 213, 89th Cong., 1st Sess. 101-102 (1965). Moreover, the limitation of the Section 1402(g) exemption to self-employment taxes is a reasonable classification because it distinguishes between self-employed persons, who are most likely to possess the economic resources necessary to provide for themselves, and wage earners whose support may be dependent on someone else (and who are free to change their religious affiliation if they so desire). The government is not constitutionally required to exclude those wage earners and their survivors from social security coverage in favor of anticipated care for their needs by their religious community, thereby arguably coercing them economically to maintain their religious affiliation (in tension with Establishment Clause values).

In sum, Section 1402(g) represents a reasonable compromise between the interest of the government in insuring maximum participation in, and contribution to, the social security system, on the one hand, and the possibly conflicting beliefs of certain religious groups, on the other. *Committee For Public Education* v. *Nyquist*, 413 U.S. 756, 788 (1973). In attempting to implement purely neutral, secular goals through the social security system, Congress has tried to minimize, as a matter of legislative grace, otherwise justifiable burdens on members of religious groups like the Old Order Amish, without transgressing the restrictions of the Establishment Clause. The balance it has struck does not violate the First Amendment rights of appellee or the other members of the Old Order Amish sect whom he employs.

ARGUMENT

THE PAYMENT OF SOCIAL SECURITY TAXES BY EMPLOYERS AND EMPLOYEES WHO ARE MEMBERS OF THE OLD ORDER AMISH SECT DOES NOT VIOLATE THEIR FIRST AMENDMENT RIGHT TO THE FREE EXERCISE OF THEIR RELIGION EVEN THOUGH THEY MAY OBJECT ON RELIGIOUS GROUNDS TO THE PAYMENT OF SUCH TAXES AND THE RECEIPT OF SOCIAL SECURITY BENEFITS

A. The district court's ruling is contrary to this Court's decisions interpreting the Free Exercise Clause of the First Amendment

1. The judgment of the district court—that portions of Sections 3101, 3102, 3111 and 3301 of the Internal Revenue Code of 1954 are unconstitutional as applied to appellee and his employees because of their religious opposition to the social security program and the taxes levied to support it [8]—is contrary to this

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[8] As pointed out (*supra*, page 6, note 6), the district court declined to grant the injunctive relief sought by appellee because of the bar of the Anti-Injunction Act, 26 U.S.C. 7421(a). It is not entirely clear, however, whether the court intended to grant declaratory relief with respect to these taxes. In our view, such declaratory relief would likewise be proscribed by the federal tax exception set forth in the Declaratory Judgment Act, 28 U.S.C. 2201. See *Alexander* v. *Americans United, Inc.*, 416 U.S. 752, 759 (1974); *Bob Jones University* v. *Simon*, 416 U.S. 725, 732-733 n.7 (1974); see also *United States* v. *American Friends Service Committee*, 419 U.S. 7 (1974). Unlike the taxpayers in those cases, appellee also sought a refund of taxes paid pursuant to 28 U.S.C. 1346(a)(1). Employment taxes are considered "divisible." Hence, payment of the full amount of employment taxes assessed is not a prerequisite to maintaining such a refund suit. Rather, only the taxes attributable to one employee for one quarter need be paid for this purpose. See *Flora* v. *United States*, 362 U.S. 145, 171 n.37 (1960); *Boyn-*

Court's decisions interpreting the Free Exercise Clause of the First Amendment. As we shall show, the decision below cannot logically be limited either to members of the Old Order Amish sect or to the specific taxes involved in this proceeding. If the government's power to levy generally imposed taxes must yield to the religious beliefs of the particular individuals in this proceeding, then it presumably must also yield to the sincere religious beliefs of any other taxpayer who may oppose on religious grounds the payment of these or other taxes. Our system of taxation could not produce the required revenues if the social welfare and other policies of the government were required to be consistent with the religious beliefs of each individual taxpayer. Here, the taxes at issue impose a minimal and incidental burden upon the exercise of appellee's and his employees' religious beliefs. In these circumstances, appellee's religious objections must yield to the specific public interest in maintaining the financial integrity of the revenues and the social security system.

It is, of course, well settled that the Free Exercise Clause of the First Amendment affords substantial protection for the diverse religious beliefs and practices in this country. This Court has held that the Free Exercise Clause prohibits governmental regulation of religious beliefs as such (*Cantwell* v. *Connecticut*, 310 U.S. 296, 303 (1940)), or governmental interference with the dissemination of religious ideas.

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ton v. *United States*, 566 F.2d 50, 52 (9th Cir. 1977). Thus, the district court had jurisdiction to consider appellee's constitutional arguments in support of his refund claim. It is, however, questionable whether appellee has standing to raise any constitutional objections to those taxes on behalf of his employees. See *infra*, page 21, note 10.

See *Fowler* v. *Rhode Island*, 345 U.S. 67 (1953); *Follett* v. *Town of McCormick*, 321 U.S. 573 (1944). It also prohibits misuse of secular governmental programs "to impede the observance of one or all religions or * * * to discriminate invidiously between religions, * * * even though the burden may be characterized as being only indirect." *Braunfeld* v. *Brown*, 366 U.S. 599, 607 (1961). The Court has also noted that "even as to neutral prohibitory or regulatory laws having secular aims, the Free Exercise Clause may condemn certain applications clashing with imperatives of religion and conscience, when the burden on First Amendment values is not justifiable in terms of the Government's valid aims." *Gillette* v. *United States*, 401 U.S. 437, 462 (1971); see, *e.g.*, *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972).

It is equally well established, however, that a person is not protected from every incidental burden on the exercise of his religion resulting from the implementation of a neutral, secular governmental interest. *Braunfeld* v. *Brown*, *supra*, 366 U.S. at 603; *Johnson* v. *Robison*, 415 U.S. 361, 383-386 (1974); *Gillette* v. *United States*, *supra*, 401 U.S. at 461-462; see *Prince* v. *Massachusetts*, 321 U.S. 158 (1944); *Reynolds* v. *United States*, 98 U.S. 145 (1878). In determining whether a particular statute is supported by a governmental interest that outweighs a person's free exercise of rights, it is necessary (*McDaniel* v. *Paty*, 435 U.S. 618, 635, n.8 (1978) (Brennan, J., concurring in the judgment))—

> to balance the importance of the secular values advanced by the statute, the closeness of the fit between those ends and the means chosen, and the impact an exemption on religious grounds would have on the State's goals, on the one hand, against the sincerity and centrality of the ob-

> jection to the State's goals to the sect's religious practice, and the extent to which the governmental regulation interfered with that practice, on the other hand.

See *Wisconsin* v. *Yoder*, *supra*, 406 U.S. at 214 (the interest of the government is subject to "a balancing process when it impinges on fundamental rights * * * such as those specifically protected by the Free Exercise of the First Amendment"); *Johnson* v. *Robison*, *supra*; *Gillette* v. *United States*, *supra*. "To strike down, without the most critical scrutiny, legislation which imposes only an indirect burden on the exercise of religion, *i.e.*, legislation which does not make unlawful the religious practice itself, would radically restrict the operating latitude of the legislature." *Braunfeld* v. *Brown*, *supra*, 366 U.S. at 606. Accordingly, this Court has repeatedly observed that a generally imposed income tax does not have a prohibited coercive effect on religious practices or beliefs. *Follett* v. *Town of McCormick*, *supra*, 321 U.S. at 577-578; *Murdock* v. *Pennsylvania*, 319 U.S. 105, 112 (1943); see *Braunfeld* v. *Brown*, *supra*, 366 U.S. at 606.

The indirect burden imposed on the exercise of appellee's religion as a result of the imposition of the social security taxes at issue here is minimal when compared to those cases where the individuals' interest freely to exercise his religion has prevailed over the competing governmental interest. This is not a case where a person was required to choose between a complete forfeiture of unemployment benefits and her day of worship (*Sherbert* v. *Verner*, 374 U.S. 398 (1963)), between the forfeiture of such benefits and adherence to his religious principles regarding employment in the production of weapons (*Thomas* v. *Review Board*, No. 79-952 (Apr. 6,

1981)), or between holding political office and pursuing a religious vocation (*McDaniel* v. *Paty, supra*). Nor is this an instance where a person is required to swear before a God not of his choice as a condition of public office (*Torcaso* v. *Watkins*, 367 U.S. 488 (1961)), or where the members of a sect are subject to compulsory public education requirements and therefore forced to expose their children to what they consider worldly influences dangerous to their religious beliefs (*Wisconsin* v. *Yoder, supra*). Indeed, one can hardly imagine a more neutral and secular activity—or one that is any less burdensome on the free exercise of religion—than the payment of generally imposed taxes.

The district court's reliance on *Wisconsin* v. *Yoder* and *Sherbert* v. *Verner* (J.S. App. 5a-8a) is therefore misplaced. In both of those cases, the burden on the exercise of the individual's religious beliefs was far greater, and imposed in the face of a far less compelling government interest, than here. In *Yoder*, this Court upheld the claim of members of the Old Order Amish sect that enforcement of a state statute requiring an additional one or two years of formal high school attendance would violate the free exercise of their religion. That holding, however, does not insulate members of the Old Order Amish from the fiscal burdens that a civilized and pluralistic society may impose on its citizens simply because they may disagree with the objectives that society, through its duly constituted political institutions, has chosen to pursue, or with the manner in which it has chosen to pursue them.[9]

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[9] The appropriate accommodation between the beliefs of the Old Order Amish and the demands of our society is aptly illustrated by *Slabaugh* v. *United States*, 474 F.2d 592

The burden on religion considered in *Yoder* is not comparable to the generally imposed social security taxes at issue here. In *Yoder*, this Court found that the Wisconsin mandatory school attendance statute threatened the very existence of the Old Order Amish sect because its adherents could not compromise the belief in question without being "assimilated into society at large." *Wisconsin* v. *Yoder*, *supra*, 406 U.S. at 218. The interest of the state in requiring an additional one or two years of formal high school attendance was deemed insufficient against the claim of the Old Order Amish that exposing their children to public education during the "crucial adolescent period of religious development," "would gravely endanger if not destroy the free exercise of respondents' [Old Order Amish] religious beliefs." *Wisconsin* v. *Yoder*, *supra*, 406 U.S. at 219, 223. The choice faced by the Amish parents in *Yoder* was either to risk losing their children from their faith, a process that in the long run would eliminate the sect, or to violate the law. No such choice need be made here. Although appellee claims that the payment of the tax would be a sin, it does not, as did the burden in *Yoder*, threaten the integrity of his religious beliefs. Appellee and his employees can continue freely to

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(6th Cir.), cert. denied, 414 U.S. 868 (1973). There, a 21 year old male member of the Old Order Amish sect, who had been classified by his local draft board as a conscientious objector, refused to report for alternative civilian service. Relying on *Yoder*, he argued that he deserved preferential treatment because of "the exceptional requirements which the Amish religion makes of its adherents and the disruptive effect on Amish values of a forced co-mingling with the world at large" (see 474 F.2d at 593). The court, however, rejected his argument, implicitly finding the alternative service to be a permissible burden on the free exercise of his religion.

exercise their religious beliefs with only a minor financial burden equal to that of any other employer or employee.[10]

Finally, the Court concluded in *Yoder* that the state's mandatory attendance statute, as applied to the Old Order Amish, would do little to further the reasons for enacting the statute (406 U.S. at 222). The admitted interests of the state there were to prepare its citizens to be productive members of society and to prepare them to participate in our political system. Those interests were fully satisfied both by the earlier public education accepted by the Amish and by the alternative education the children received in the Amish community. Here, by contrast,

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[10] At all events, it is doubtful whether the burden of these taxes on the religious beliefs and practices of appellee's employees is properly at issue here. Where FICA taxes are withheld from employees' wages, the employer may claim a refund on their behalf, but only if he has repaid the tax to the employees or has obtained the employees' written consent to claim a refund on their behalf. Treasury Regulation on Employment Taxes, Section 31.6402(a)-2(a)(2) (26 C.F.R.). Here, however, the taxes were not withheld from the employees' wages, and liability has been imposed solely on appellee pursuant to Section 3102(b) of the Code. Moreover, none of those employees joined in bringing this action. Consequently, with respect to the employees' share of FICA taxes here involved, the only burden that would seem pertinent to the decision is the burden imposed on appellee, as an employer, of withholding those taxes from his employees' wages and paying the withheld amounts over to the United States. Sections 3102(a) and 7501 of the Code. The burden of the FUTA taxes and the employer's share of the FICA taxes, on the other hand, must be borne by the employer in any event. Thus, while it may be appropriate here to consider how the imposition of that liability may burden the exercise of appellee's own religious beliefs, the religious beliefs of his employees have no bearing on the question of his liability for those taxes.

the governmental interest in the fiscal integrity of the social security system requires maintaining broad participation in the program (see Point B, *infra*, pages 24-29). Accordingly, *Yoder* does not support appellee's constitutional challenge to the social security taxes.

Sherbert v. *Verner*, *supra*, is similarly distinguishable. There, the Court upheld the claim of a member of the Seventh-Day Adventist Church that making unemployment compensation contingent on a willingness to work on Saturday would violate the free exercise of her religion. A member of the Seventh-Day Adventist Church was discharged by her employer because she would not work on Saturday, the Sabbath Day of her faith. She was unable to obtain other employment in the vicinity where she lived because of her religious belief that she could not work on Saturday. South Carolina denied the appellant's claim for unemployment benefits on the ground that she failed without reasonable cause to accept available employment. This Court held that disqualification of a Seventh-Day Adventist from unemployment compensation solely because of her refusal to accept employment in which she would have to work on Saturday violated the Free Exercise Clause. The appellant there was faced with a constitutionally unacceptable choice. She had to give up either her Sabbath Day or her economic means of survival. Appellee faces no comparable choice here.

To the same effect is the Court's recent decision in *Thomas* v. *Review Board*, *supra*. There, a Jehovah's Witness was transferred by his employer to a department that fabricated turrets for military tanks. He voluntarily terminated his employment, asserting

that his religious beliefs prevented him from participating in the production of weapons. The petitioner was denied unemployment benefits by Indiana on the ground that his voluntary termination was not based upon a good cause arising in connection with his work as required by the pertinent Indiana statute. This Court concluded that the case was governed by *Sherbert* v. *Verner* and that the denial of benefits accordingly violated the petitioner's free exercise of his religion. Here, by contrast, the interference occasioned by the imposition of generally imposed taxes is not comparable to the burden in *Thomas*. The proceeds of federal income, estate, and gift taxes, and miscellaneous excise taxes, may be used to fund other activities in conflict with appellee's or others' religious beliefs.[11] The burden of paying or withholding

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[11] A prime example is the supplemental security income program for the aged, blind, and disabled (42 U.S.C. 1381 *et seq.*), which was enacted as Title XVI of the Social Security Amendments of 1972, Pub. L. No. 92-603, Section 301, 86 Stat. 1329. The purpose of Title XVI of the Act was to establish a national program to provide supplemental security income to individuals who have attained age 65 or are blind or disabled, and thus to assume part of the welfare burden on state and local governments. It was estimated that in the first year of the program 6.2 million people would be eligible for benefits. H.R. Rep. No. 231, 92d Cong., 1st Sess. 147 (1971). Section 1381 note (42 U.S.C.) authorizes Congress to appropriate sums out of the general revenue sufficient to carry out this program. An example of a joint federal-state program designed to provide social welfare benefits out of the general revenue is the Aid to Families with Dependent Children (AFDC) program (42 U.S.C. 601 *et seq.*). Under this program, the federal government provides grants on a matching fund basis for states that have qualifying plans for the distribution of money for the benefit of needy children. See *King* v. *Smith*, 392 U.S. 309, 313, 316-317 (1968).

FICA and FUTA taxes upon appellee's religious beliefs is certainly no greater than the burden of the other taxes imposed upon appellee and upon the citizenry generally by the revenue statutes.[12]

B. The public need to maintain broad participation in the social security program is more substantial than the limited burden upon appellee's religious beliefs imposed by the payment of social security taxes

The district court found the burden placed by these taxes on the Old Order Amish sect to be impermissible because members of the sect consider it "a sin to fail to provide for or to allow another to provide for your own people" (J.S. App. 3a). The court concluded that "[n]ot only is it considered a sin to *accept*, it is also considered a sin to *pay*, for to pay is to deny their faith" (*ibid.*; emphasis in original). But the payment of FICA and FUTA taxes does not prevent appellee or his employees from providing for other members of their sect, nor is he or any of his employees forced to accept social security benefits. Thus, they can protect the integrity of their own religious beliefs and practices simply by declining to accept social security benefits and continuing to provide support for those members of their community who are in need. The payment of FICA and FUTA taxes no more commits appellee or other members of the Old Order Amish sect to a binding insurance contract in violation of their religious beliefs than does the payment of federal income taxes, which are

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[12] As the plurality observed in *Braunfeld* v. *Brown*, *supra*, 366 U.S. at 606, "[s]tatutes which tax income and limit the amount which may be deducted for religious contributions [permissibly] impose an indirect economic burden on the observance of the religion of the citizen whose religion requires him to donate a greater amount to his church * * *."

used to support a myriad of governmental expenditures and benefits, which may be similarly opposed by them or various other religious groups. See *United States* v. *American Friends Service Committee*, 419 U.S. 7 (1974).

Moreover, there is nothing in the record showing that members of the Old Order Amish sect are opposed, on religious grounds, to the government's payment of social security and unemployment benefits to persons other than members of that sect. Indeed, even if the Old Amish were opposed to contributiing to the general welfare of persons not adhering to their own faith, it is well settled that the Free Exercise Clause of the First Amendment provides no basis for avoiding generally imposed tax obligations simply on the basis of sincerely held religious beliefs opposing the use the government makes of those revenues.[13] As the Ninth Circuit observed in *Autenrieth* v. *Cullen*, 418 F.2d 586, 588 (1969), cert. denied, 397 U.S. 1036 (1970), "[t]he Income Tax Act does not 'aid one religion, aid all religions, or prefer one religion over another.' Nor does it punish anyone 'for entertaining or professing religious beliefs or disbeliefs.'

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[13] See, *e.g.*, *Lull* v. *Commissioner*, 602 F.2d 1166 (4th Cir. 1979), cert. denied, 444 U.S. 1014 (1980); *Autenrieth* v. *Cullen*, 418 F.2d 586 (9th Cir. 1969), cert. denied, 397 U.S. 1036 (1970); *Graves* v. *Commissioner*, 579 F.2d 392 (6th Cir. 1978); *Costello* v. *Commissioner*, 34 T.C.M. (CCH) 320 (1975), aff'd mem., 76-1 U.S.T.C. ¶ 9117 (2d Cir. 1975); *Anthony* v. *Commissioner*, 35 T.C.M. (CCH) 1357 (1976), aff'd per curiam, 566 F.2d 1168 (3d Cir. 1977), cert. denied, 436 U.S. 904 (1978); *Runnings* v. *Commissioner*, 36 T.C.M. (CCH) 904 (1977), aff'd, 620 F.2d 311 (9th Cir. 1980); *United States* v. *Haworth*, 386 F. Supp. 1099 (S.D. N.Y. 1974); *Muste* v. *Commissioner*, 35 T.C. 913 (1961); *Russell* v. *Commissioner*, 60 T.C. 942 (1973).

* * * It taxes plaintiff like all others, because they are citizens or residents who have taxable income. On matters religious, it is neutral." (citations omitted.) The FICA and FUTA taxes, aiding no religion and preferring no religion over another, are likewise neutral.[14]

In contrast to the minimal, neutral effect that FICA and FUTA taxes have on the exercise of appellee's religion and that of his employees, the governmental interest in maintaining widespread participation in the social security program is very substantial. Although there is no perfect symmetry between contributions and benefits, social security benefits are, to a certain extent, dependent on the amount of taxes paid. See *Carmichael* v. *Southern Coal Co.*, 301 U.S. 495, 521-523 (1937). Appellee's FICA and FUTA taxes are commingled with other FICA and FUTA taxes and are used to support millions of other persons who need the benefits offered by the social security system. Indeed, as Congress recognized when it enacted the self-employment tax exemption of Section 1402(g) (see *infra*, pages 29-38), some individual members of the Old Order Amish sect may themselves want those benefits. H.R.

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[14] Although it sought to protect appellee's religious interest, the effect of the district court's decision is to base an employer's tax liability on the religious preference of his employees. In order to determine his own tax liability an employer would necessarily be compelled to inquire into the religious belief of each of his employees. The district court has therefore improperly interjected religious considerations into the workplace, by holding that the Constitution requires Congress to grant exemptions on grounds that would foster private discrimination in employment on the basis of religion. See *Braunfeld* v. *Brown*, *supra*, 366 U.S. at 609 (states are not constitutionally required to adopt a system of exemptions from Sunday closing laws that would encourage private employment discrimination on the basis of religion).

Rep. No. 213, *supra*, at 12. The present social security system was established when private systems of voluntary support collapsed under the burden of all those who had no other means of survival. *Carmichael* v. *Southern Coal Co.*, *supra*, 301 U.S. at 515-518; *Steward Machine Co.* v. *Davis*, 301 U.S. 548, 586-587 (1937); *Helvering* v. *Davis*, 301 U.S. 619, 641-643 (1937); *United States* v. *Silk*, 331 U.S. 704, 710 (1947). The system's ability to take care of the nation's unemployed and retired citizens would be severely strained if all those who could provide for themselves, either by individual efforts or through other social arrangements, could voluntarily withdraw from the program based on opposition to the program on grounds of religion or conscience.[15]

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[15] Appellee has suggested (Motion to Affirm at 5) that the decision here would have little impact beyond the exemption provided for under Section 1402(g). On the contrary, however, litigation involving the constitutionality of that provision indicates that there may be far more widespread opposition to the social security system on asserted grounds of conscience and religious belief than would be encompassed by the narrow provisions of Section 1402(g). See, *e.g.*, the case cited at pages 29-30, *infra*. Surely, no distinction between the cases involving challenges to Section 1402(g) and the instant case could be drawn on the basis of an evaluation of the merits of religious beliefs of the particular taxpayers involved. *United States* v. *Seeger*, 380 U.S. 163, 184-185 (1965); *Thomas* v. *Review Board*, *supra*. Moreover, a constitutionally mandated exemption such as that adopted by the court below arguably could not be subject to the limitations placed on Section 1402(g) by Congress, such as the requirement that the group in question have been in existence since a specified date, the requirement that the Secretary of the Department of Health and Human Services determine that the group in question has had an established practice of adequately providing for its members, or, indeed, even the requirement that all rights to benefits be waived.

In the early years of the social security system, this Court soundly rejected numerous objections to the taxes imposed in support of the program, including arguments that those taxpayers who did not need the benefits provided by the system should not be burdened with the taxes. As the Court stated in *Carmichael* v. *Southern Coal Co.*, *supra*, 301 U.S. at 522-523:

> A tax is not an assessment of benefits. It is * * * a means of distributing the burden of the cost of government. The only benefit to which the taxpayer is constitutionally entitled is that derived from his enjoyment of the privileges of living in an organized society, established and safeguarded by the devotion of taxes to public purposes. * * * Any other view would preclude the levying of taxes except as they are used to compensate for the burden on those who pay them, and would involve the abandonment of the most fundamental principle of government—that it exists primarily to provide for the common good.

The imposition of social security taxes should not turn on whether members of the Old Order Amish want to participate in the system financed by those taxes. Although the sect may take care of its own members, millions of persons in this country are dependent on these taxes. As this Court recognized in *Carmichael* v. *Southern Coal Co.*, *supra*, the success of the social security system depends on the payment of taxes whether or not the individuals paying the taxes will ever receive the benefits. The social security system could not exist if those working taxpayers who do not want to pay the taxes were exempt from the taxes simply because they have an alternative means of support.

In sum, the Free Exercise Clause has never been construed to interfere with such a fundamental societal activity as the levying of generally imposed federal taxes. As this Court observed in *Gillette* v. *United States*, *supra*, 401 U.S. at 461, in terms that effectively reject appellee's claim: "Our cases do not at their farthest reach support the proposition that a stance of conscientious opposition relieves an objector from any colliding duty fixed by a democratic government." Surely, the obligation to pay generally imposed FICA and FUTA taxes is such a duty. See *Johnson* v. *Robison*, *supra*.

C. The religious exemption from the social security tax on income from self-employment does not support appellee's claim to exemption from the employer's tax on wages

As we have noted, Section 1402(g) of the Code provides a statutory exemption for members of certain religious sects from the tax imposed by Section 1401 on earnings from self-employment. But the district court erred in relying on that exemption in support of its conclusion upholding a constitutional exemption from the employer's FICA and FUTA taxes on wages. There have been, over the years since it was enacted, a number of cases in which the constitutionality of Section 1402(g) has been challenged by taxpayers who unsuccessfully sought either to have the statute set aside or to have the exemption extended to themselves, notwithstanding their failure to satisfy all of the conditions set forth in the statute. See, *e.g.*, *Kelley* v. *Terry*, No. 78-2750 (9th Cir. Aug. 27, 1980) (unpublished memorandum opinion); *Ward* v. *Commissioner*, 608 F. 2d 599 (5th Cir. 1979), cert. denied, 446 U.S. 918 (1978); *Jaggard* v. *Commissioner*, 582 F.2d 1189 (8th Cir. 1978), cert. denied, 440 U.S. 913

(1979) (*Jaggard I*); *Varga* v. *United States*, 467 F. Supp. 1113 (D. Md., 1979), aff'd by unpublished order, 618 F.2d 106 (4th Cir. 1980); *Chapman* v. *Alexander*, 421 F. Supp. 930 (W.D. La. 1976), aff'd by unpublished order, 552 F.2d 367 (5th Cir. 1977); *Escofil* v. *Commissioner*, 376 F. Supp. 521 (E.D. Pa.), aff'd mem., 493 F.2d 1400 (3d Cir. 1974); *Jaggard* v. *Commissioner*, 76 T.C. No. 19 (Feb. 12, 1981) (*Jaggard II*); *Randolph* v. *Commissioner*, 74 T.C. 284 (1980); *Hatcher* v. *Commissioner*, 37 T.C.M. (CCH) 304, aff'd, 79-2 U.S.T.C. (CCH) ¶ 9531 (10th Cir. 1978); *Lerner* v. *Commissioner*, 34 T.C.M. (CCH) 331 (1975), aff'd by unpublished order, No. 75-1770 (3d Cir. Jan. 13, 1976); *Henson* v. *Commissioner*, 66 T.C. 835 (1976); *Palmer* v. *Commissioner*, 52 T.C. 310 (1969); *Stevenson* v. *Commissioner*, 41 T.C.M. (CCH) 1121 (Mar. 19, 1981). The courts that have reached the question have uniformly concluded that the exemption provided by Section 1402(g) is constitutionally permissible.[16] and, until the decision below, no court has ever suggested that it is required under the Free Exercise Clause.

Indeed, the courts have held that conscientious objection to the social security system and the taxes designed to support that system does not constitute a valid claim to exemption under the Free Exercise

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[16] See, *e.g.*, *Jaggard* v. *Commissioner*, *supra*, 582 F.2d at 1190; *Varga* v. *United States*, *supra*, 467 F. Supp. at 1118-1119; *Lerner* v. *Commissioner*, *supra*, 34 T.C.M. (CCH) at 331 n.3. Other courts, however, have declined to reach the Establishment Clause issue raised in such cases on the theory that the taxpayer involved lacked standing to challenge the constitutionality of those provisions. See, *e.g.*, *Ward* v. *Commissioner*, *supra*, 608 F.2d at 601. Cf. *Varga* v. *United States*, *supra*, 467 F. Supp. at 1119 n.7.

Clause, whether that opposition is based merely on philosophical or "moral" principles (*e.g.*, *Varga* v. *United States*, *supra*, 467 F. Supp. at 1117-1118; *Palmer* v. *Commissioner*, *supra*, 52 T.C. at 313; cf. *Escofil* v. *Commissioner*, *supra*).[17] We submit that no principled constitutional distinction can be drawn, in regard to this question, between the sincerely held religious beliefs of a member of the Old Order Amish sect, on the one hand, and those of a Seventh-Day Adventist (*Varga* v. *United States*, *supra*; *Randolph* v. *Commissioner*, *supra*; *Palmer* v. *Commissioner*, *supra*), a Quaker (*Hatcher* v. *Commissioner*, *supra*), or a devotee of Sai Baba (*Henson* v. *Commissioner*, *supra*), on the other. Thus, while Congress may have permissibly made this accommodation under Section 1402(g) to the religious beliefs and social practices of members of the Old Order Amish sect as a matter of legislative grace, it was not compelled to do so by the Free Exercise Clause or any other provision of the Constitution.

Once having granted that statutory exemption from the tax imposed by Section 1401 on income from self-employment, Congress was under no compulsion to extend a similar exemption to employers and employees meeting the requirements of that Section from the FICA and FUTA taxes imposed by Sections 3101, 3111 and 3301 of the Code. Indeed, though appellee appears to have based his contentions, and

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[17] Such decisions are, of course, fully in accord with the similar body of cases (cited at page 29, note 13 *supra*) holding that conscientious opposition, on the basis of sincerely held religious beliefs, to the use to which the government makes of its revenues, or to contributing to such use, provides no basis under the Free Exercise Clause for avoiding the obligation to pay the full measure of income taxes imposed by Congress on all citizens.

the district court its conclusions, solely on the privileges guaranteed by the First Amendment, no Free Exercise considerations would even be affected by Congress' decision to limit the scope of the Section 1402(g) exemption to self-employment taxes. Members of the Old Order Amish sect who choose to enter the employment market place as an employer or an employee will, of course, become subject to an obligation not incurred by members of that sect who are neither employers nor employees. But this distinction is not based on religious beliefs but rests solely upon economic classifications—*viz.*, those involved in an employment relationship and those who are self-employed. Indeed, the social security tax liability that Old Amish employers and employees incur is precisely the same as that of all other employers and employees, who are subject to the taxes in question without regard to their religious persuasions or their agreement with the aims of the federal social security and unemployment benefit programs.

Moreover, this Court has consistently upheld divergent tax treatment so long as there is any rational basis for the classification. *Flint* v. *Stone Tracy Co.*, 220 U.S. 107 (1911) (federal excise tax imposed on incorporated businesses but not on similar unincorporated business upheld); *Lehnhausen* v. *Lake Shore Auto Parts Co.*, 410 U.S. 356 (1973) (Illinois statute that imposed personal property taxes on businesses but not on individuals upheld). In *Brushaber* v. *Union Pac. R.R.*, 240 U.S. 1, 24-25 (1916), this Court rejected early challenges to the progressive federal income tax enacted following the ratification of the Sixteenth Amendment, a tax structure that differentiated, among other things, between corporations and individuals, and between those with greater income

and those with lesser income. The decisions of this Court therefore establish beyond question that legislatures enacting tax statutes have "large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation." *Lehnhausen* v. *Lake Shore Auto Parts Co., supra*, 410 U.S. at 359. "In levying * * * taxes the most ample authority has been recognized from the beginning to select some and omit other possible subjects of taxation, to select one calling and omit another, to tax one class of property and to forbear to tax another." *Flint* v. *Stone Tracy Co.*, 220 U.S. 107, 158 (1911). See also *United States* v. *Maryland Savings-Share Ins. Corp.*, 400 U.S. 4 (1970).

Indeed, in early challenges to the Social Security Act, this Court established that Congress has considerable discretion in the classification of taxpayers in implementing the social security system. *Carmichael* v. *Southern Coal Co., supra; Steward Machine Co.* v. *Davis*, 301 U.S. 548 (1937); *Helvering* v. *Davis*, 301 U.S. 619 (1937). For example, in *Carmichael* v. *Southern Coal Co., supra*, the Court upheld a tax, enacted to support the unemployment benefits of the social security system, that exempted numerous classes of taxpayers, including employers that had fewer than eight employees, agriculture workers, domestic servants, and sailors on ships traveling on navigable waters of the United States. The tax in issue there did not apply to self-employed individuals at all.[18] In upholding the diverse classifi-

[18] The Court pointed out in *Carmichael* v. *Southern Coal Co., supra*, 301 U.S. at 508, that the imposition of a tax on the employer-employee relationship is of a type traditional in the history of Anglo-American legislation. "[T]axes on the exercise of the right to employ or be employed, were

cations at issue there, this Court reaffirmed the permissible scope of classifications for federal tax purposes (*Carmichael* v. *Southern Coal Co.*, *supra*, 301 U.S. at 509; citations omitted):

> This Court has repeatedly held that inequalities which result from a singling out of one particular class for taxation or exemption, infringe no constitutional limitation.
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> * * * * *
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> Like considerations govern exemptions from the operation of a tax imposed on the members of a class. A legislature is not bound to tax every member of a class or none. It may make distinctions of degree having a rational basis, and when subjected to judicial scrutiny they must be presumed to rest on that basis if there is any conceivable state of facts which would support it.

While self-employed persons were brought within the scope of the social security system in 1950 (Social Security Act Amendments of 1950 ch. 809, Section 208, 64 Stat. 540), even now self-employed persons are taxed on a substantially different basis from employed individuals. Sections 1401 and 1402. Given the decisions in *Carmichael* v. *Southern Coal Co.*, *Helvering* v. *Davis*, and *Steward Machine Co.* v. *Davis*, *supra*, it could hardly be contended that the distinction between self-employed persons and employees under either the original provisions of the Social Security Act or its present provisions is constitutionally questionable. The specific distinction

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known in England and the Colonies before the adoption of the Constitution, and must be taken to be embraced within the wide range of choice of subjects of taxation" reserved by the Constitution. See *Steward Machine Co.* v. *Davis*, *supra*, 301 U.S. at 548, 578-580.

drawn, in Section 1402(g), between self-employed adherents of the Old Order Amish sect and members of that sect who employ or are employed by others is no more suspect than the distinctions that have been drawn between self-employed and employed persons generally.

In sum, the classification made in Section 1402(g) involves at most a difference in the tax treatment accorded employed and self-employed members of the same religious sect. Moreover, since appellee himself is treated in precisely the same manner, with respect to the FICA and FUTA taxes in question, as any other similarly situated employer, regardless of his religious beliefs, there is hardly any room for him to complain that, as to himself, Section 1402(g) reflects an improper classification under either the Due Process Clause or the Free Exercise Clause.

At all events, we submit that Congress had a rational basis for limiting the Section 1402(g) exemption to the tax imposed on self-employment income under Section 1401 of the Code. The legislative history of Section 1402(g) shows that Congress was concerned that there would be no broad exception to the strongly held policy against making participation in the social security system a voluntary matter. Thus, the exemption was limited to the self-employment tax "since those persons for whom the payment of social security taxes appears to be irreconcilable with their religious convictions also, by reason of their religious beliefs, limit their work almost entirely to farming and to certain other self-employment." H.R. Rep. No. 213, 89th Cong., 1st Sess. 101-102 (1965). The Treasury supported this restriction because "these sects established in farming communities * * * could be more certainly relied upon to identify and provide for their dependent and elderly members than those

in the mobile and transcient urban environment." *Social Security: Hearings on H.R. 6675 Before the Senate Comm. on Finance*, 89th Cong., 1st Sess., Pt. 2, 1003 (1965).

Limiting the Section 1402(g) exemption to self-employment taxes is a reasonable classification because it distinguishes between self-employed persons, who are most likely to possess the economic resources necessary to provide for themselves, and those persons, employees, whose support may be dependent on someone else. It was reasonable for Congress to assume that even if it so desired, a religious group such as the Old Amish, might not, in fact, be able to provide adequately for all its members who depend on employment for their livelihood either in periods of high unemployment, or in periods during which such individuals are otherwise unable to find gainful employment. It was likewise reasonable for Congress to require that where such individuals depart from their traditional self-employment activities and actively participate in the economic community as employees or employers of others, they should be called upon to contribute to the social security system in the same measure as all other employers and employees, whether or not they ultimately choose to partake in the benefits of that system.[19]

Indeed, it must be remembered that appellee's employees (or their survivors) are free, if they so

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[19] As this Court recognized more than 40 years ago, the shift from an agrarian to an industrial society brought with it social ills that could be rectified only by government intervention. In turning aside arguments against a tax passed by Alabama to support the unemployment compensation segment of the social security system, the Court stated: "[U]nemployment apparently has become a permanent incident of our industrial system. * * * * * Although employment in Alabama is predominantly in agriculture, and the court below

desire, voluntarily to change their religious affiliation in the future, and there is also the possibility that they could otherwise become ineligible for economic support from their religious community. Exclusion of those wage earners and their survivors from social security coverage in favor of anticipated care for their needs by their religious community, therefore, could arguably amount to a form of governmental economic coercion on them to maintain their religious affiliation in good standing—a result in significant tension with Establishment Clause values. We submit that the Constitution does not require Congress to follow that course. Instead, where, as here, either the granting or the withholding of such an exemption necessarily implicates some tension with the pertinent constitutional values, Congress should be afforded a measure of discretion to fashion what it deems to be a reasonable and just accommodation. Cf. *Braunfeld* v. *Brown*, *supra*, 366 U.S. at 608 (Sabbatarian exemption from Sunday closing laws is constitutionally permissible but not constitutionally required). See also, *e.g.*, *Walz* v. *Tax Commission*, 397 U.S. 664 (1970); *Zorach* v. *Clausen*, 343 U.S. 306 (1952); *Everson* v. *Board of Education*, 330 U.S. 1 (1947) (all involving accommodations held constitutionally permissible, but not necessarily constitutionally required).

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found that agricultural unemployment is not an acute problem, the census reports disclose the steadily increasing percentage of those employed in industrial pursuits in Alabama." *Carmichael* v. *Southern Coal Co.*, *supra*, 301 U.S. at 515, 517. Realizing that employees are more vulnerable to economic distress than the self-employed, distinctions drawn in Section 1402(g) between an employer-employee relationship and the self-employed (particularly farmers) have been consistently made since the social security system was first enacted.

In sum, Section 1402(g) represents a reasonable accommodation between the interest of the government in insuring maximum participation in, and contribution to, the social security system, on the one hand, and the possibly conflicting beliefs of certain religious groups, on the other. *Committee For Public Education* v. *Nyquist*, *supra*, 413 U.S. at 788. In attempting to implement purely neutral, secular goals through the social security system, Congress has tried to minimize, as a matter of legislative grace, otherwise justifiable burdens on members of religious groups like the Old Order Amish, without transgressing the restrictions of the Establishment Clause. *Social Security: Hearings on H.R. 6675 Before the Senate Comm. on Finance*, 89th Cong., 1st Sess., Pt. 2, 996-1000 (1965); see *Walz* v. *Tax Commission*, *supra*, 397 U.S. at 669. The balance Congress has carefully struck does not violate the First Amendment rights of appellee or the other members of the Old Order Amish sect whom he employs.

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted.

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JUNE 1981

APPENDIX

Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 1402. DEFINITIONS.

* * * * *

(g) [as added by Section 319(c), Social Security Amendments of 1965, Pub. L. No. 89-97, 79 Stat. 396; as amended by Section 1901(a), Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1789] MEMBERS OF CERTAIN RELIGIOUS FAITHS.—

(1) *Exemption.*—Any individual may file an application (in such form and manner, and with such official, as may be prescribed by regulations under this chapter) for an exemption from the tax imposed by this chapter if he is a member of a recognized religious sect or division thereof and is an adherent of established tenets or teachings of such sect or division by reason of which he is conscientiously opposed to acceptance of the benefits of any private or public insurance which makes payments in the event of death, disability, old-age, or retirement or makes payments toward the cost of, or provides services for, medical care (including the benefits of any insurance system established by the Social Security Act). Such exemption may be granted only if the application contains or is accompanied by—

(A) such evidence of such individual's membership in, and adherence to the tenets or teachings of, the sect, or division thereof as the Secretary [or his delegate] may require for purposes of

determining such individual's compliance with the preceding sentence, and

(B) his waiver of all benefits and other payments under titles II and XVIII of the Social Security Act on the basis of his wages and self-employment income as well as all such benefits and other payments to him on the basis of the wages and self-employment income of any other person,

and only if the Secretary of Health, Education, and Welfare finds that—

(C) such sect or division thereof has the established tenets or teachings referred to in the preceding sentence,

(D) it is the practice, and has been for a period of time which he deems to be substantial, for members of such sect or division thereof to make provision for their dependent members which in his judgment is reasonable in view of their general level of living, and

(E) such sect or division thereof has been in existence at all times since December 31, 1950.

An exemption may not be granted to any individual if any benefits or other payment referred to in subparagraph (B) became payable (or, but for section 203 or 222(b) of the Social Security Act, would have become payable) at or before the time of the filing of such waiver.

* * * * *

(3) *Period For Which Exemption Effective.*—An exemption granted to any individual pursuant to this subsection shall

apply with respect to all taxable years begining after December 31, 1950, except that such exemption shall not apply for any taxable year—

(A) beginning (i) before the taxable year in which such individual first met the requirements of the first sentence of paragraph (l), or (ii) before the time as of which the Secretary of Health, Education, and Welfare finds that the sect or division thereof of which such individual is a member met the requirements of subparagraphs (C) and (D), or

(B) ending (i) after the time such individual ceases to meet the requirements of the first sentence of paragraph (l), or (ii) after the time as of which the Secretary of Health, Education, and Welfare finds that the sect or division thereof of which he is a member ceases to meet the requirements of subparagraph (C) or (D).

* * * * *

SEC. 3101 [as amended by Section 321(b), Social Security Amendments of 1965, *supra*] RATE OF TAX.

(a) *Old-Age, Survivors, And Disability Insurance.*—In addition to other taxes, there is hereby imposed on the income of every individual a tax equal to the following percentages of the wages (as defined in section 3121(a)) received by him with respect to employment (as defined in section 3121 (b))—

* * * * *

(b) [as added by Section 321(b), and amended by Sec. 111(G)(5), Social Security Amendments of 1965, *supra*] *Hospital Insurance.*—In addition to the tax imposed by the preceding subsection, there is hereby imposed on the income of every individual a tax equal to the following percentages of the wages (as defined in section 3121(a)) received by him with respect to employment (as defined in section 3121(b)—

* * * * *

SEC. 3102. DEDUCTION OF TAX FROM WAGES.

(a) [as amended by Section 205A, Social Security Amendments of 1954, ch. 1206, 68 Stat. 1093; Section 201(h)(3), Social Security Amendments of 1956, ch. 836, 70 Stat. 841, and Section 313(c)(2), Social Security Amendments of 1965, *supra*] *Requirement.*—The tax imposed by section 3101 shall be collected by the employer of the taxpayer, by deducting the amount of the tax from the wages as and when paid. An employer who in any calendar quarter pays to an employee cash remuneration to which paragraph (7)(B) or (C) or (10) of section 3121(a) is applicable may deduct an amount equivalent to such tax from any such payment of remuneration, even though at the time of payment the total amount of such remuneration paid to the employee by the employer in the calendar quarter is less than $50; and an employer who in any calendar year pays to an employee cash remuneration to which paragraph (8)(B) of section 3121(a) is applicable may deduct an

amount equivalent to such tax from any such payment of remuneration, even though at the time of payment the total amount of such remuneration paid to the employee by the employer in the calendar year is less than $150 and the employee has not performed agricultural labor for the employer on 20 days or more in the calendar year for cash remuneration computed on a time basis; and an employer who is furnished by an employee a written statement of tips (received in a calendar month) pursuant to section 6053(a) to which paragraph (12)(B) of section 3121(a) is applicable may deduct an amount equivalent to such tax with respect to such tips from any wages of the employee (exclusive of tips) under his control, even though at the time such statement is furnished the total amount of the tips included in statements furnished to the employer as having been received by the employee in such calendar month in the course of his employment by such employer is less than $20.

* * * * *

SEC. 3111 RATE OF TAX.

(a) [as amended by Section 321(c), Social Security Amendments of 1965, *supra*] *Old-Age, Survivors, And Disability Insurance.*—In addition to other taxes, there is hereby imposed on every employer an excise tax, with respect to having individuals in his employ, equal to the following percentages of the wages (as defined in section 3121(a)) paid by him with respect to employment (as defined in section 3121(b))—

* * * * *

(b) [as added by Section 321(c), and amended by Section 311(c), Social Security Amendments of 1965, *supra*] *Hospital Insurance.*—In addition to the tax imposed by the preceding subsection, there is hereby imposed on every employer an excise tax, with respect to having individuals in his employ, equal to the following percentages of the wages (as defined in section 3121 (a) and (t)) paid by him with respect to employment (as defined in section 3121(b))—

* * * * *

SEC. 3301 [as amended by Section 301(a), Employment Security Amendments of 1970, Pub. L. No. 91-373, 84 Stat. 713] RATE OF TAX.

There is hereby imposed on every employer (as defined in section 3306(a)) for the calendar year 1970 and each calendar year thereafter an excise tax, with respect to having individuals in his employ, equal to 3.2 percent of the total wages (as defined in section 3306(b)) paid by him during the calendar year with respect to employment (as defined in section 3306(c)).

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No. 80-767

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

UNITED STATES OF AMERICA,

Appellant,

v.

EDWIN D. LEE,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

BRIEF FOR APPELLEE EDWIN D. LEE

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QUESTION PRESENTED

Whether Section 3101, 3102, 3111 and 3301 of the Internal Revenue Code of 1954 (26 U.S.C.), which impose certain social security taxes on employers and employees, are constitutional as applied to persons who object, on religious grounds, both to the payment of taxes levied to support such benefits and to the receipt of such benefits.

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BRIEF FOR APPELLEE EDWIN D. LEE

STATUTES INVOLVED

Sections 1402(g), 3101, 3102, 3111 and 3301 of the Internal Revenue Code of 1954 (26 U.S.C.). The statutes are set forth in the Brief for the United States at 1a - 6a.

STATEMENT

1. The Appellee is a member of the Old Order Amish, who is self-employed. The United States of America sought to collect certain taxes from him which represents Social

Security taxes which the Appellee failed to withold from the pay of other members of the Old Order Amish, whom he employed.

The Old Order Amish is a bona fide religious organization and recognized as such by both the United States Government and the Internal Revenue Service.

Also, the Old Order Amish are conscientiously and religiously opposed to the acceptance of any public insurance which makes payments in the event of death, disability, old age, or retirement or makes payments toward the cost of, or provides services for medical care, including the benefits of any insurance system established by the Social Security Act.

A major principal of the Amish religion is the responsibility of the Amish for its own members. Commercial insurance and governmental insurance programs, including the Federal Insurance Contribution Act, are contrary to this religious principal.

The Amish believe that old age survivors insurance is abridging and infringing to their religious freedom. They believe that their faith is sufficient to meet their needs as they come. They believe, as the Bible says, "But if any provide not. . . for those of his own house, he hath denied the faith, and is worse than an infidel". (I Timothy 5:8)

The Amish believe that to pay F.I.C.A. tax is to admit that the government has a responsibility for aged Amish members, although they do not collect Social Security benefits, and to admit any such responsibility is to deny their own responsibility, one of their main religious principals.

As an Amishman, the Appellee is an adherent of these established teachings which cause him to be conscientiously opposed to the payment of and the acceptance of Social Security benefits. Consequently, the Appellee belongs to a

religious sect which follows the practice of making provisions for its dependent members.

The Internal Revenue Code provides an exemption from self-employment tax if a person can show that he is self-employed and is a member of a religious sect which follows the practice of making provisions for its dependent members. The exemption, however, does not extend to those who work for others.

2. The district court upheld the position of the Appellee. The Court, in citing the 26 U.S.C. 1402(g)[1] exemption, stated that the Congress seems to have concluded that where a group is both religiously opposed to public welfare and has provided its own alternative source of remedial welfare, the government interest has been protected and is, therefore, not required. The Court stated that the free exercise of one's religion is a fundamental, natural, absolute right, firmly entrenched in the foundation and the history of our legal system. Courts have given the First Amendment a broad interpretation in light of its history and the evils it was designed to prevent. When this right has come into conflict with an equally valued and respected governmental interest, the Court will apply a balancing test to determine which must yield to the other. See *Wisconsin v. Yoder,* 406 U.S. at 214,

[1]26 U.S.C. 1402(g) Exemption—Any individual may file an application (in such form and manner, and with such official, as may be prescribed by regulations under this chapter) for an exemption from the tax imposed by this chapter if he is a member of a recognized religious sect or division thereof and is an adherent of established tenets or teachings of such sect of division by reason of which he is conscientiously opposed to acceptance of the benefits of any private or public insurance which makes payments in the event of death, disability, old age, or retirement or makes payments toward the cost of, or provides services for, medical care (including the benefits of any insurance system established by the Social Security Act).

Johnson v. Robinson, 415 U.S. 361, *Gillette v. United States,* 401 U.S. 437.

The Amish have protected themselves since the 16th Century from the very same interest which the government has attempted to protect when Social Security legislation was enacted in the 20th Century. The Amish believe that, "But if any provide not. . .for those of his own house, he hath denied the faith and is worse than an infidel". (I Timothy 5:8) As such, they have their own social security system (as do federal employees); they care for their aged, their sick and their unemployed. They live in a self-sufficient community.

Also, the granting of the exemption does not interfere with the establishment or preservation of the general welfare of the public.

The history of the 1402(g) exemption substantiates this fact:

> We believe that an exemption from Social Security taxes. . . would be justifiable only in cases where it is amply clear that an individual cannot accept the benefits of insurance, including social security benefits without renouncing the basic tenet of his religion. . . (p. 101).
>
> . . . an exemption may be granted only if the Secretary of Health, Education & Welfare makes the following findings with respect to the religious sect. . . That it is the practice and has been for a period of time when the Secretary deems to be substantial, for members of such sect or division thereof to make provisions for their dependent members which, in the judgment of the Secretary, is reasonable in view of the general level of living of the members of the Sect or division thereof. (p. 228).
>
> H. R. Rep. No. 213, 89th Cong. 1st Sess. (1965) pp. 101 & 228.

SUMMARY OF ARGUMENT

1. A major principle of the Amish religion is the responsibility of the Amish to care for its own members. Payment into any insurance program, including the Federal Insurance Contribution Act, is regarded as a sin and contrary to one of the very basic tenets of the Old Order Amish, for they believe as the Bible says, "But if any provide not. . . for those of his own house, he hath denied the faith, and is worse than an infidel". (I Timothy 5:8) Consequently, requiring Mr. Lee to pay into the Social Security system is to deny to him the free exercise of his religion. And since the Amish sufficiently care for the needs of each other, they are protecting the very interest which the government intended to protect when Social Security legislation was initially enacted.

2. The effect of the denial of the right of the Old Order Amish under the Free Exercise Clause of the First Amendment would be substantial when compared to the general public need if an exemption is not permitted in this instance. The lower court gave to the Appellee the requested exception to the general rule in order to further his religious exercise. In doing so, it performed a balancing act. On the one hand was the sin that the law was compelling Mr. Lee to commit; and on the other hand was the interest of the government in collecting a minimal amount of Social Security insurance from Mr. Lee for the common good.

Here, the cost for religious tolerance would be small, while the benefit to the Appellee in providing religious freedom for him would be great.

ARGUMENT

THE PAYMENT OF SOCIAL SECURITY TAXES BY EMPLOYERS AND EMPLOYEES WHO ARE MEMBERS OF THE OLD ORDER AMISH SECT VIOLATES THEIR FIRST AMENDMENT RIGHT TO THE FREE EXERCISE OF THEIR RELIGION.

A. The payment of funds into the Social Security System is a violation of the Appellee's rights under the Free Exercise Clause of the First Amendment.

The Appellee, Edwin D. Lee, is a member of the Old Order Amish Faith and community; a community which has been recognized by the United States Supreme Court as "... a highly successful social unit within our society" and one which "... reject(s) public welfare in any of its usual modern views". Congress has recognized such groups as the Amish as exempt from the obligation to pay Social Security taxes. See *Wisconsin v. Yoder,* 406 U.S. at page 222.

The Appellee's religious beliefs prevent him from paying Social Security taxes. Payment of Social Security taxes or payment into any insurance fund is regarded as a sin and contrary to one of the very basic tenets of the Old Order Amish Faith, for they believe as the Bible says, "But if any provide not... for those of his own house, he hath denied the faith, and is worse than an infidel." (I Timothy 5:8)

The Appellee is required as a member of the Old Order Amish to collect for and pay into the Social Security program on behalf of his employees, all of whom are Old

Order Amish. This requirement is in direct conflict with the tenets of his religion and is forbidden by the free exercise clause of the First Amendment. The free exercise clause, like the establishment clause, withdraws from legislative power, state and federal, the exercise of any restraint on the free exercise of religion. *School District of Abington Township, Pa. v. Schenpp,* 83 S. Ct. 1566, 374 U.S. 203, 10 L.Ed.2d 844 (1963). In this highly sensitive area "it is basic that no showing merely of a rational relationship to some colorable state interest would suffice." *Sherbert v. Verner,* 374 U.S. 398, S. Ct. 790, 10 L. Ed.2d 965B (1963).

The requirement that demands that Appellee become both a tax collector for the Social Security program and to pay into the program must have a compelling state interest to justify it when the requirement is in direct conflict with his religion. Such a compelling interest cannot exist where an exemption has been granted for self-employed Old Order Amish, and, within the purpose of such exemption, the categories of payors in the instant case would fit without destroying the caution included in the history of the Act. "Only the gravest abuses endangering paramount interest, give occasion for permissible limitation." *Thomas v. Collins,* 323 U.S. 516, 530. Under the facts of the instant case, no such abuse or danger appears as would justify the limitation on the practice of the Old Order Amish religion.

It must be emphasized that this not a case in which Appellee or other members of his group are seeking a free ride in order, at some future date, to collect under the Social Security program after never having paid into it. But rather, the group of Old Order Amish as a whole have consistently rejected any claim to benefits under the program and have consistently provided for other members of their group as well as their extended family, thereby making the group self-sufficient.

The Old Order Amish and their beliefs and practices are worthy of preservation. The government should not discourage such practice by forcing members of this group to obey a law which is in direct conflict with a basic tenet of their religion. Diversity among the peoples of the United States is of unquestioned importance and such diversity must be preserved.

Without question, a major principle of the Amish religion is the responsibility of the Amish for its own members. Commercial insurance and governmental insurance programs, including the Federal Insurance Contribution Act, are contrary to this religious principle. The Appellant's interest in the social well-being of its citizens hould not be free from a balancing process whenever it infringes upon other fundamental rights and interest, such as those specifically protected by the free exercise of religion clause of the First Amendment.

In order for the Appellants to force Mr. Lee to perform an act which he consideres to be a sin and against his basic religious beliefs, it must appear either that the government does not deny the free exercise of religious beliefs by its requirement, or that there is a governmental interest of sufficient magnitude to override the interest claiming protection under the free exercise of religion clause. *Wisconsin v. Yoder,* 406 U.S. 205, 32 L.Ed.2d 15, 92 S.Ct. 1526.

Does the government deny Mr. Lee the free exercise of his religion by requiring him to pay into the Social Security system? We think so.

There can be no question that by forcing Mr. Lee to pay money into the Social Security system is denying him the free exercise of his religion, since by paying into the system, he is, stated very simply, committing a sin. The Amish

believe that there is only one pervasive set of values and differences which arise are considered heresies. These people have one system of values and whenever changes in the established tradition are threatened, they are looked upon as serious offenses by the entire sect. To them, it makes no difference whether you are an employer or employee. Consequently, in every part of their life, the prevailing beliefs and traditions are reaffirmed, including their belief against insurance. In their life also, a strict religious atmosphere prevails, which underlines these beliefs with a sense of compulsion which strikes deeply in the conscience of every Amishman. Some time ago, the goverment seized cows from a Pennsylvania Amishman who refused to pay the Old Age and Survivors Insurance Tax. If the tax was paid, the Amishment would have admitted that the government has a responsibility for aged Amish members, and to admit that is to deny their own responsibility, one of their main religious principles.

Next, is there a governmental interest of sufficient magnitude to override the interest claiming protection under the free exercise of religion clause? We think not.

The Amish believe that their faith is sufficient to meet their needs as they come. He shuns commercial forms of insurance, for, in his judgment, he already has the best kind of insurance. If a barn burns down, the neighbors are there to help him build a new one. If he becomes ill, they do his work. Should he die suddenly, they make arrangements to have the farm operation continue.

Amish mutual aid provides "Social Security" for its members from birth to death. Security comes from friendly personal relations. It is their belief that responsibility for mutual aid stems from father and mother, brother and sister, uncle and aunt, and church members, and not from

impersonal and remote sources, such as investment bonds or state security. Consequently, mutual aid is practiced by the Amish as a religious belief.

It is important to note that the Amish do not object to paying income taxes; they do object to receiving government aid or having their children and grandchildren fall heir to such a temptation. Consequently, the need or interest which the government is attempting to meet has already been met by the Amish people. The Amishman who lives by his standards enjoy a secure and self-sufficient family and community life, without the aid of the Federal Government. No matter how strong the government's interest is in a mutual security system, it should not be contrary to the religious beliefs of the Amish people as it affects them as a group.

In *Wisconsin v. Yoder,* supra, at page 215, the Supreme Court of the United States said:

> .... In evaluating those claims (that compulsory school-attendance statute beyond the 8th grade was in violation of the Freedom of Religion cause of the First Amendment) we must be careful to determine whether the Amish religious faith and their mode of life are, as they claim, inseparable and interdependant.

Again, in *Yoder, supra,* the history of the amish sect was explained in great detail, beginning with the Swiss Anabaptists, as stated on page 210 of Yoder:

> .... they (Swiss Anabaptists) sought to return to the early simple, christian life, de-emphasizing material success, rejecting the competitive spirit, and seeking to insulate themselves from the modern world. As a result of their common heritage, Old Order Amish communities today are characterized by a fundamental belief that salvation requires life in a church community separate and apart from the world and wordly influence. This concept of life aloof from the world and its values is central to their faith.

By considering the stipulations entered into by the parties, it is apparent that the Amish do not support the traditional norms of our society, such as insurance, and that their objection is not a matter of personal preference, but rooted in deep religious conviction. They have held loudly and firmly to St. Paul's edect "be not conformed to this world..." Their life is simple, their belief is simple, their total existence, from days beginning to days end is guided by their desire for the salvation of their soul, and their total existence is directed toward that end.

Laws which threaten their interdependence also threaten their religious beliefs and their continued existence as a religious society. Their belief of mutual aid is not based upon economic principles, personal individual beliefs, or even their desire not to conform to majority standards. Simply, their belief is based upon a major principle of the Amish religion—that is his own responsibility for his own brother, firmly intrenched within a people which follows the practice of making provisions for its dependent members.

In sum, the personal impact of forcing an Amishman to pay money into a system which provides governmental benefits is to admit that the government has a responsibility for aged Amish members and to admit this is to deny their own responsibility.

The present state of the law as it relates to Amish employers and employees is also very interesting.

In *Yoder, supra,* at page 222, the Supreme Court of the United States said:

> ".... the Amish community has been highly successful social unit within our society, even if apart from the conventional ("mainstream"). Its members are productive and very law-abiding members of society; they reject public welfare in any of its usual modern forms.

> The Congress itself recognized their self-sufficiency by authorizing exemption of such groups as the Amish from the obligation of pay social security taxes."

The quote taken from *Yoder, supra,* is not altogether correct in substance. Congress has exempted Amishman who are self-employed by virtue of 26 USC 1402(h). No exemption exists for Amishman who are employees. However, the important aspect of the law is that Congress has recognized the fact that an individual can object and be conscientiously opposed to the *payment* (emphasis added) of a tax, which objection is bottomed upon a religious belief. It is interesting to note that the history of the exemption shows it became law because of the beliefs of the Old Order Amish. H.R. Rep. No. 213, 89th Cong. 1st Sess., 101-102 (1965).

The government, while recognizing that the Free Exercise Clause of the First Amendment affords protection for different and diverse religious beliefs and practices, counters with the argument that incidental burdens are not protected. They evidentially recognize the commission of a sin as an incidental burden, not worthy of protection. They opine that the burden considered in *Yoder* is not comparable to the generally imposed social security taxes at issue here. They firmly state that the choice faced by the Amish parents in Yoder was far greater than the choice which is to be made here, since in Yoder they (the parents) risked losing their children from their faith if the law was obeyed. Oddly enough, the government states that the burden in Yoder threatened the integrity of their religious beliefs, while the burden here is minimal with only a minor financial burden placed upon the Appellee.

The argument of the government misses the mark. To pay the tax is to deny the faith. To pay the tax is to deny

responsibility to your neighbor. To pay the tax is to deny your faith in God's ability to care for your future need. To pay the tax is to become an infidel. To pay the tax, stated simply, is to commit a sin. And the commission of a sin cannot be considered to be incidental to the religious beliefs of the Amish people. The Amish here face the choice of either committing a sin or paying the taxes. With an additional choice being faced by Mr. Lee, i.e. accepting employment not requiring the help of others.

It should be pointed out that the sin itself is bottomed upon a powerful religious conviction based upon an obligation and duty to conscientiously care for each other, couples with a belief that God will care for all needs. Consequently, the payment of the tax may be incidental, but the infringement upon free exercise is nonetheless substantial.

B. The effect of the denial of the right of the Old Order Amish under the Free Exercise Clause of the First Amendment would be substantial when compared to the general public need.

The Old Order Amish belong to a group which, as the lower court noted, is clearly defined, long recognized, and unquestionably sincere. There is no danger of an open-ended category, capable of uncontrolled expansion. The Old Order Amish, and groups like them, are small whose labor generates a small amount of wages and taxes. The loss of revenue from granting the exemption would be negligible. (See page 5(a) Jurisdictional Statement).

The Supreme Court of the United States has generally viewed the Religion Clauses of the First Amendment as having two different mandates. One clause forbids legislation (1) respecting an establishment of religion, and (2) prohibiting the free exercise of religion.

Under the Free Exercise Clause, no law can regulate religious beliefs. *Cantwell v. Connecticut,* 310 U.S. 296, 303 (1940). However, very few laws, if any, single out any religious group for adverse treatment. Most issues involving the Free Exercise clause arise from laws which have a sincere secular purpose, but which penalize certain groups because of some particular religious belief, such as the issue presented here.

In this regard, the Court has established a test—without a state interest of the highest order, *Wisconsin v. Yoder,* 406 U.S. 205, the government must grant an exception to the rule.

Certainly, the aim of the establishment clause was to forbid Congress from enacting any legislation which would force people to support a religion by use of taxes for sectarian purposes. Such is not the purpose of the Free Exercise Clause.

In *Sherbet v. Verner,* 374 U.S. 398 91963), Mrs. Sherbert, who was a mill worker and a Seventh Day Adventist, was discharged from her employment because she would not work on Saturdays, which happened to be the Sabbath of her faith. Apparently, all the mills in her area adopted a six (6) day work week. She was refused unemployment compensation by the State of South Carolina because she refused suitable work, which would require her to work on Saturday. This requirement was held to be in violation of the Free Exercise Clause, because requiring her to work on Saturday violated a principle of her religious faith; and consequently, penalized the free exercise of her religion.

Indeed, in upholding the position of Mrs. Sherbert, the Court protected the type of injuries the Free Exercise Clause was intended to prevent. And, in doing so, the effect on the general public was minimal.

The Court simply gave to Mrs. Sherbert an exception to the general rule to further her religious exercise.

The same is true here. The lower court gave to Mr. Lee an exception to the general rule to further his religious exercise. And in doing so, it performed a balancing act. On the one hand was the sin that the law was compelling Mr. Lee to committ; and on the other, was the interest of the government in collecting a minimal amount of Social Security insurance from Mr. Lee for the common public good.

One cannot escape the conclusion that the activities of individuals and requirements imposed upon them are regulated by the state in order to promote the health, safety and general welfare. See *Gillette v. United States,* 401 U.S. 437. But to agree that religious conduct must often be subjected to the welfare policy of the state is to deny many areas protected by the Free Exercise Clause.

When one considers closely the situation, whenever a requirement interferes with the religious beliefs of the majority of the people, that requirement is soon obliterated. That is, if workers in Mrs. Varner's South Carolina were required to work seven days a week, or even six days a week including Sunday, certainly, the Sunday "requirement" would soon thereafter be eliminated, because it would be in conflict with the religious views of the majority. Consequently, any exemptions given to minorities, such as the Old Order Amish, is simply equalizing their position.

It is not the position of the Appellee that every equalizing accommodation must be granted. However, when that accommodation has little effect on the public good and the cost to the public is non-religious in nature, then the exception should be granted. As such, the cost of religious tolerance in this case is small, almost non-existent, while the benefit to the Appellee is great, in that it affords to him the

right to the free exercise of his religion, without obliging him to make a choice between paying an insurance premium and in doing so, denying his religion, or refusing to pay the premium and subjecting himself to the applicable penalties.

The government has taken the position that the *payment* of F.I.C.A. and F.U.T.A. taxes does not prevent Appellee from providing for his own people, nor are he or any of his employees forced to accept Social Security benefits.

Again, the argument of the government is off mark because it fails to recognize a basic element of the Amish belief; that is, to *pay* into the system is to recognize the responsibility of some other entity to care for the needs of one's neighbor. The difference in *paying* and *receiving* is subtle, but substantial in view of the belief of the Old Order Amish.

Obviously, taxation to support a church is religious coercion and contrary to the Establishment Clause. Just as obvious, taxation to support what one would consider to be a religious duty is, again, religious coercion. Hypothetically, if legislation was enacted which would give a reimbursement for fuel expenses used by individuals who transport their children to and from church, it would be violative of the Establishment Clause, since it is the duty of the parents to provide the transportation.

Here, the Old Order Amish consider it a religious duty to care for each other, and legislation requiring payment into a system which enables some other individual or entity to provide that care is tantamount to religious coercion, which coercion could seemingly influence the Amish into actually changing their religious beliefs if they were forced to *pay* into the system.

When Yoder is reduced to its lowest common denominator, the Court is, very simply, protecting Amish children

from learning the ways of the material world. By requiring the Amish to pay into the Social Security system is forcing them to become privy to a system which would influence their religious beliefs, thus not affording to them the same protection as provider in Yoder.

Again here, we are dealing with value judgments when we address the question of "paying into" the system. Consider the hypothetical law requiring all grocery stores to be closed on Sunday. Whatever the value to society would be, it would seem unlikely that that interest would overcome the Sabbatearian's interest in not forcing him to violate his religious principles by remaining open on Sunday since Saturday is his Sabbath. Consequently, it would seem unlikely that the interest of the state in requiring Mr. Lee to pay into the system would or should overcome his interest in violating a basic tenet of his religion. Especially, when his contribution to the system is so small and becomes even more minute when compared to the religius compromises he must make when paying into the system.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1981

UNITED STATES OF AMERICA, APPELLANT

v.

EDWIN D. LEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

REPLY BRIEF FOR THE UNITED STATES

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1. Appellee argues (Br. 5) that "the cost for religious tolerance would be small, while the benefit to [him] in providing religious freedom for him would be great" if the social security tax could not constitutionally be applied to persons who object, on religious grounds, both to the payment of taxes levied to support such benefits and to the receipt of such benefits. But, as we have pointed out in greater detail in our opening brief, the tax statute appellee seeks to invalidate neither prohibits the practice of his religion nor threatens the integrity of his religious beliefs. The Free Exercise Clause has never been construed to interfere with such a fundamental

societal activity as the levying of generally imposed federal taxes. Instead, this Court has repeatedly observed that a generally imposed income tax does not have a prohibited coercive effect on religious practices or beliefs. *Follett* v. *Town of McCormick*, 321 U.S. 573, 577-578 (1944); *Murdock* v. *Pennsylvania*, 319 U.S. 105, 112 (1943). "To strike down, without the most critical scrutiny, legislation which imposes only an indirect burden on the exercise of religion, *i.e.*, legislation which does not make unlawful the religious practice itself, would radically restrict the operating latitude of the legislature." *Braunfeld* v. *Brown*, 366 U.S. 599, 606 (1961) (plurality opinion).

The result should be no different here because this case involves the FICA and FUTA taxes used to fund social welfare programs in which appellee (and, perhaps, his employees) would choose not to participate. Congress did not have to enact those taxes to obtain revenues for the social security benefit programs, but could have chosen instead to obtain the necessary funds from the income tax or other general taxes. Although appellee states (Br. 10) that the Amish do not object to payment of the income tax, a substantial portion of the revenues derived from that tax is in fact used to support various social welfare benefit programs. See our opening brief at 23, n.11. Since members of the Old Order Amish sect could become eligible for benefits under those programs, appellee's challenge to the FICA and FUTA taxes stands on the same footing as a challenge to the general income tax. Congress has wide latitude to determine how to secure revenues (see *Fernandez* v. *Wiener*, 326 U.S. 340, 352 (1945)). There is accordingly no reason why it should make a difference what kind of tax Congress chooses to impose to support the payment of social security benefits. The

FICA and FUTA taxes, like the income tax, are general obligations imposed on every person who meets the statutory requirements and are entirely neutral with respect to religion. As the Ninth Circuit observed in *Autenrieth* v. *Cullen*, 418 F.2d 586, 588-589 (1969), cert. denied, 397 U.S. 1036 (1970), in terms that are equally applicable here—

> If every citizen could refuse to pay all or part of his taxes because he disapproved of the government's use of the money, on religious grounds, the ability of the government to function could be impaired or even destroyed. See, for example, *Crowe* v. *Commissioner of Internal Revenue*, 8 Cir., 1968, 396 F.2d 766, where a taxpayer declined to pay his income tax because he objected to being made 'to contribute to the welfare of people who made no effort to support themselves.' There are few, if any, governmental activities to which some person or group might not object on religious grounds.

2. Finally, if appellee's claim to exemption from employer's social security taxes were upheld, the result would be to encourage him to limit his hiring to members of the Old Order Amish sect who would not object to the absence of social security coverage. While Congress might choose to confer the exemption appellee seeks, it surely is not constitutionally compelled to do so, where the consequence would be to foster hiring on the basis of religion. As the plurality observed in an analogous context in *Braunfeld* v. *Brown*, *supra*, 366 U.S. at 609, in rejecting a constitutional claim of exemption from the Sunday closing laws for persons who observe another day of rest, "in order to keep the disruption of the day at a minimum, exempted employers would probably have to hire employees who themselves qualified for the

exemption because of their own religious beliefs, a practice which a State might feel to be opposed to its general policy prohibiting religious discrimination in hiring [footnotes omitted]". Here, even if there is no legal impediment to respondent's choosing to restrict employment to members of his own sect,[1] Congress is not constitutionally required to provide him with an economic incentive to do so.

For the reasons stated above and in our opening brief, the judgment of the district court should be reversed.

Respectfully submitted.

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Solicitor General

OCTOBER 1981

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[1] See 42 U.S.C. 2000e(b) and 2000e-2(a) (prohibiting discrimination on the basis of religion by employers of fifteen or more persons); Pa. Stat. Ann. tit. 43, § 955 (Purdon Supp. 1980) (prohibiting discrimination on the basis of religion by employers of four or more persons).

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No. 80-767

IN THE

Supreme Court of the United States

October Term, 1980

UNITED STATES OF AMERICA,

Appellant,

v.

EDWIN D. LEE

On Appeal From the United States District Court for the Western District of Pennsylvania

BRIEF AMICUS CURIAE OF NATIONAL COMMITTEE FOR AMISH RELIGIOUS FREEDOM

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COUNTERSTATEMENT OF QUESTION PRESENTED

Does the imposition of the federal Social Security tax on members of the Old Order Amish religion violate their rights protected by the Free Exercise Clause of the First Amendment?

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IN THE

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UNITED STATES OF AMERICA,

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v.

EDWIN D. LEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

BRIEF AMICUS CURIAE OF NATIONAL COMMITTEE FOR AMISH RELIGIOUS FREEDOM

INTEREST OF THE AMICUS CURIAE

The National Committee For Amish Religious Freedom, with headquarters at 30650 Six Mile Road, Livonia, Michigan, is a nonprofit association formed in 1967 for the following purposes as stated in its articles of organization:

> "The protection, preservation, defense and advancement of the religious liberty and other humane and civil rights and liberties of the Amish community and similar religious groups, as well as the religious liberty and all other said rights of all citizens, and the elimination of religious prejudice and discrimination."

The National Committee is made up of professors, lawyers, clergymen and citizens from many religious faiths, all non-Amish. The Committee sees, in the present case, a serious threat to religious liberty.

ARGUMENT

I. The Imposition of Sections 3101, 3111 and 3301 Upon Appellee Violates His Free Exercise of Religion

A. The Test to Be Applied

Sherbert v. Verner, 374 U. S. 368 (1963) states the test that statutes which burden the free exercise of religion must meet if they are to be held constitutional in the face of First Amendment challenge. "Such imposition must be justified by a compelling state interest in the regulation of a subject within the State's constitutional power to regulate." *Id.* at 403. The Court illuminated the concept of "compelling state interest" as follows:

> "It is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, '[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation'." *Id.* at 406.

And see *Wisconsin v. Yoder*, 406 U. S. 205, 215 (1972).

Under the *Sherbert-Yoder* test, therefore, it is necessary to inquire: (1) Does a genuine religious liberty claim exist? (2) If so, did the State violate that liberty? (3) If it did, is that violation nevertheless justified by a compelling state interest?

B. The Appellee's Religious Liberty Claim

The Amish Faith Community. A remarkable phenomenon in the midst of the American technological society of 1981, Amish communities continue to exist as utterly distinctive from the surrounding society. As a religious sect, the Amish have been described as "introversionist" rather than "conversionist" or "reformist", believing that "Salva-

tion is to be found in the community of those who withdraw from involvement in the affairs of mankind."[1] Merely to acknowledge, as does the Government here, that the religious beliefs of the Old Order Amish do not permit their participation in Social Security, scarcely does justice to the fact that religion is the essence, reason for being, and giver of total direction to the Amish community.[2] Among the most basic elements of historic practiced belief among the Amish are the principles of *separation from the world* (which involves the avoidance of anything but minimal involvement with government) and the interrelated principles of *mutual aid* and *self-sufficiency.* As to the latter, Professor Hostetler[3] has written:

> "The Amish people maintain positive religious teachings and attitudes toward helping all their needy members. They are deeply sensitive to any forces that would erode the principle of self-sufficiency in caring for their old people, widows, and orphans. Self-sufficiency is the Amish answer to government aid programs such as farm subsidies and social security payments. They comply with crop reduction programs but refuse payments for raising fewer crops. Amish leaders have repeatedly gone to Washington to seek freedom from federal aid. It is not that they are opposed to paying taxes, but they are opposed to any form of dependency on government.

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1. B. WILSON, RELIGIOUS SECTS, 22 as quoted in J. A. HOSTETLER, AMISH SOCIETY, 7 (3rd ed. 1980).

2. See generally, HOSTETLER, *supra*, 21-24; 77-79.

3. Professor John A. Hostetler is Professor of Anthropology and Sociology, Temple University, and is the foremost authority on Amish society. His testimony in *Wisconsin v. Yoder*, 406 U. S. 205 (1972) was noted by the Supreme Court in its opinion. *Id.* at 212.

> The Amish opposition to compulsory insurance was widely publicized when social security benefits were extended (Public Law 761, January 1, 1955) to cover self-employed persons, including farmers. A delegation of Amish bishops made numerous trips to Washington seeking exemption from the tax and its benefits. Before congressional committees they contended that 'Old-Age Survivors Insurance is abridging and infringing to our religious freedom.' In support of their stand they quoted the Bible: 'if any provide not . . . for those of his own house, he hath denied the faith, and is worse than an infidel' (I Tim. 5:8). *To pay social security tax, the Amish say, is to admit that the government has a responsibility for aged Amish members, and to admit this is to deny the faith. They know that this alliance with government would make future generations dependent on the government. Federal means of providing for these needs are viewed as purely secular, if not sinful."* [4] (Emphasis supplied).

The District Court made findings of fact that (a) in the Amish faith it is a sin to allow an outsider to provide for one's own people (b) hence it is also a sin to accept governmental care (or equivalent monetary payment) for Amish aged, sick or unemployed (c) or to make payments into a program by which government would make such provision, irrespective of whether the benefits were accepted or not. Jurisdictional Statement, 3a, 8a. The Government did not dispute those findings.

C. The Appellee's Religious Liberty Is Here Violated

The Government's Position. There is no dispute that the appellee's religious liberty would be violated by en-

4. HOSTETLER, *supra*, at 264.

forcement against him of the provisions of Social Security legislation. The Government, however, considers the imposition of the structure a merely "incidental" burden upon the exercise of the Amish religion, and that any generally imposed income tax cannot have a "prohibited coercive effect on religious practice or beliefs." Brief for the United States, 8. The Government addresses itself to the appellee's view that it would be sinful for an Amishman to make payments into the Social Security program. The Government then volunteers its own *religious* judgment, on behalf of the Amish, that the payment is not really sinful at all. This is to say (according to the Government), the payment does not violate the precept of I Timothy, 5:8,[5] because (a) paying of the FICA and FUTA taxes does not prevent the appellee from providing for his own people, and (b) the Amish can simply refuse to accept Social Security benefits. Thus is presented a governmental exegesis on I Timothy 5:8 and a consequent governmental absolution from sin. And so the position of the government comes to this: If Amishman Lee's religious liberty is violated, the violation is *de minimis*; but in fact it is not violated at all.

The Free Exercise Violation is Substantial. The degree to which the free exercise of religion is violated herein is a question of fact. But the fact of substantial violation, like the fact of the existence of a religious belief itself, is to be found through examination of the believer, not from those outside the religion. *United States v. Ballard*, 322 U. S. (1953). As Professor Tribe has well stated:

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5. Appellee, in the District Court, had cited I Timothy 5:8 as a Scriptural basis for refusal to conform to the Social Security statutes. The passage reads: "But if any provide not . . . for those of his own house, he hath denied the faith and is worse than an infidel."

"At the very least, it should therefore be clear that, when free exercise issues are raised, religious claims are to be examined not in terms of the majority's concept of religion but in terms of the social functions of the group, *or in terms of the role the beliefs assume in the individual's life.*" L. H. TRIBE, AMERICAN CONSTITUTIONAL LAW, 831. (Emphasis supplied).

The propert test therefore is: *What is belief to the believer?* (Not: What is belief in the eyes of the Government?) The sincerity of the assumed believer is, of course, material. But here all acknowledge the sincerity of appellee. Jurisdictional Statement, 30; Brief for the United States, 7. The centrality of the belief, in the religion of the believer, is likewise of basic importance. Here there can be no doubt that resistance to payment into the Social Security program is based upon Amish concepts which are central to the faith. The Amish have long and universally—on religious grounds—declined to participate in any program which contains the principle that the government has responsibility for the sustenance of Amish people.[6] Well known Amish convictions with respect to separation from the world, mutual support, and self-sufficiency form the basis of Amish belief that to pay into the federal Social Security program is sinful. If, to them, that is so, then (whether justifiably or unjustifiably) the free exercise of the Amish religion is violated, not minimally but substantially, by the requirement of payment into the Social Security program.

The Government cites various decisions of this Court on behalf of its claim that here involved is merely an "incidental" burden on the exercise of religion. Brief for the United States, 17-19 (citing *Reynolds v. United States,*

6. See HOSTETLER, *supra,* 264-267.

98 U. S. 145 (1878); *Prince v. Massachusetts*, 321 U. S. 158 (1944); *Johnson v. Robison*, 415 U. S. 361 (1974); *Gillette v. United States*, 401 U. S. 437 (1971); and *Braunfeld v. Brown*, 366 U. S. 599 (1961)). In none of these, except *Johnson* and *Braunfeld*, did the Court find a merely "incidental" burden on religious exercise; instead the *ratio decidendi* was the presence of a towering governmental interest. (See discussion *infra* at 9-10). *Johnson* involved merely a claim for veterans' benefits by a conscientious objector, the Court's opinion providing no details of any religious claim such as the Amish here advance. The Court in *Johnson* was thus able to conclude that the withholding of the education benefits involved, at most, an incidental burden on the objector's religious exercise. *Id.* at 485. *Braunfeld* involved the application of Sunday closing laws to Orthodox Jewish merchants. The Court held that this imposition constituted but an "indirect" burden on the observance of the religion involved. It is to be noted that *Braunfeld* was prior to the Court's decision in *Sherbert, supra*, and its conclusion must be regarded as doubtful in light of *Sherbert*.[7] In any event even the test set down in *Braunfeld* contains the important caveat that the state may not even *indirectly* burden the free exercise of religion if it "may accomplish its purpose by means which do not impose such a burden." *Braunfeld, supra*, at 607. As will be seen, such means are fully present in the instant case.

The Government also invited comparison with the burden on religious exercise found unconstitutional in *Sherbert, supra, McDanial v. Paty*, 435 U. S. 618 (1978), *Yoder, supra, Torcaso v. Watkins*, 367 U. S. 488 (1961)

7. "Justice Stewart was therefore right in concluding that *Braunfeld* cannot stand consistently with *Sherbert*, and in arguing that 'the *Braunfeld* case was wrongly decided and should be overruled'." TRIBE, *supra*, at 855.

and *Thomas v. Review Board,* 101 S. Ct. 1425 (1981). To this list the Government might well have added the imposition, different in kind, but not in degree, imposed in the present case.

The Government, however, goes on to argue that no violation of Amish liberties at all can be found, due to the aforementioned Government application of Scripture to the facts of this case. Here the Government beckons the Court in a direction which this Court has long held itself precluded from going. If a religious claimant establishes that particular conduct is forbidden to him by a teaching of his religion which is central to it, and if his claim is undeniably sincere, the courts are allowed "*no* role" to adjudge that the conduct is not actually forbidden by the religion. *Watson v. Jones,* 80 U. S. (13 Wall.) 679, 726-729 (1871); *Presbyterian Church v. Mary Elizabeth Blue Hull Presbyterian Church,* 393 U. S. 440, 450 (1970).

Thus this appeal turns on but a single question: Is the imposition of the challenged statutes upon the Amish justified by a compelling state interest?

D. Imposition of the Social Security Program Upon the Old Order Amish Is Not Justified by Any Compelling State Interest.

A mere "public interest" does not justify the denial of religious liberty. If it did, any statute could override religious liberty since all statutes are presumed to be in the public interest. *Atchison, Topeka & Santa Fe Railroad Co. v. Matthews,* 174 U. S. 96, 104 (1898). This Court's insistence that it be shown that a religious practice, if it is to be suppressed or curtailed, poses a threat to a *supreme* public interest is obviously essential to the existence of religious liberty. The Government alleges no such threat. Its citation to *Reynolds, Johnson, Gillette* and *Prince,* moreover, serves to highlight the fact that no

such threat exists by virtue of Amish non-participation in Social Security payments.

Reynolds, supra, was a prosecution for the federal crime of bigamy. Speaking from the moral climate of that time, the Court characterized polygamy (which practice was called for by the Mormon religion) as a crime which "has always been odious among the Northern and Western Nations of Europe" (*id.* at 164) and which indeed in England and Wales had been "made punishable in the Civil Courts, and the penalty was death," *Id.* at 165. Plainly the Court in *Reynolds* found a governmental interest in the suppression of a religious practice as one going to the very existence of society.[8] In *Prince v. Massachusetts, supra,* the Court similarly found a state interest in curtailing religious exercise far exceeding any to be found in the present case. *Prince* involved the employment of a nine-year-old girl to hawk religious magazines on city streets at night. The Court upheld the application, in the premises, of the Massachusetts child labor law under the doctrine of *parens patriae. Johnson v. Robison, supra,* is remote, on its facts, from the present case, involving merely a claim for veterans' benefits by a conscientious objector—the Court's opinion providing no specifics about any religious claim. *Gillette v. United States, supra,* while likewise inapplicable, again mirrors the extreme importance of the governmental interest required to be shown to overcome a free exercise claim. There conscientious-objector exemption from conscription was denied because of the government's interest in procuring the manpower necessary for the defense of the nation. *Id.* at 462.

8. "In fact according as monogamous or polygamous marriages are allowed, do we find the principle on which the Government of the People, to a greater or less extent, rests." *Id.* at 165-166.

Instead of describing a compelling governmental interest in requiring the Amish to pay Social Security taxes, the Government speaks of "the public need to maintain broad participation in the Social Security program" and claims that this interest is "more substantial" than the Amish religious claim. Brief for the United States, 24. At this point in its brief, the Government once again argues its own religious claim, namely, that the Amish can "protect the integrity of their own religious beliefs and practice simply by declining to accept Social Security benefits and continuing to provide support for those members of their community who are in need." *Ibid.*

The Government describes but a *single* governmental interest in its seeking to override the Amish religious claim: it is "the governmental interest in maintaining widespread participation in the Social Security program." *Id.* at 26. This interest it describes, not, of course, as publicly crucial but merely as "very substantial", here noting that Social Security benefits are only "to a certain extent", "dependent on the amount of taxes paid." *Ibid.* Amishman Edwin D. Lee's taxes "are commingled with other FICA and FUTA taxes and are used to support millions of other persons who need the benefits offered by the Social Security system." The Government thus emphasizes the obvious: that Mr. Lee's contribution is, from a dollar point of view, *de minimis.* The real focus of the governmental fear is the assumed domino effect of a holding that Mr. Lee need not pay. *Id.* at 27. To that contention it must be said:

a. Nothing in the record supports the view of the Government "that there may be far more widespread opposition to the Social Security system on asserted grounds of conscience by the narrow provisions of Section 1402(g)." *Ibid.*, fn. 15. The existence of the handful of

litigations over the past dozen years concerning that provision (*id.* at 30) is not even a minimal indication that, were the Amish declared constitutionally exempt from payments into the Social Security program, a legion of similar objectors would arise who could make the claim which the Amish make. There is not the slightest likelihood of that. But should some other body be able to prove a tradition, a sincerity, a community, a religion and religious conviction similar to the Amish now before the Court, the prospect of that event serves as no basis for denial of rights to the Amish today.

b. The "domino effect" argument appears to be a persistent theme in governmental efforts to curtail religious liberty. In *Yoder*, for example, the State of Wisconsin argued that "the necessary effect of [a decision in favor of the Amish], therefore, is to create a broad constitutional right to conscientiously object to education rather than a narrow exemption for a particular religion." Brief for the Petitioner [State of Wisconsin], *Wisconsin v. Yoder, supra*, 27. The Court did not acknowledge merit in this counsel of fear.

That no compelling governmental interest is to be found in the imposition here sought is manifest in the fact that the Congress enacted Section 1402(g). The Government points out:

> "The legislative history shows that, in enacting the exemption in Section 1402(g), Congress specifically intended to benefit members of the Old Order Amish sect. It found the exemption justifiable where individual members of the sect 'cannot accept the benefits of insurance including social security benefits, without renouncing basic tenets of . . . [their] religion' and 'sincerely believe that *payment* of Social Security taxes is irreconcilable with their religious convictions.'" (Emphasis supplied).

Thus it is clear that in the case of the self-employment tax, no compelling governmental interest exists, *even with respect to payments.* If no such interest can be identified under Section 1402(g), it is not possible that so great an interest exists in the remaining statutory provisions as to endanger benefits for those "millions of other persons" in the nationwide program.

Finally, it is clear that there are alternative means for achieving what the Government, somewhat tentatively, describes as a "very substantial" public interest. This is seen in the very fact that this interest will obviously be achieved with or without Amish participation. As the Government notes, Social Security benefits are only "to a certain extent" dependent on the amount of taxes paid, and the fact that a few Amish dollars would not be "commingled" with the contributions of millions of other persons will not affect the program. Insofar as the aim of Congress is to benefit the small Amish population of the nation, concern need not be had. Without the help of Government—indeed, *because* their care for one another is not governmentally programmed—the Amish will provide well for their own.

CONCLUSION

The judgment of the District Court should be affirmed.

Respectfully submitted,

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